Supreme Court, U.S.
FILED
AUG 03 2007
OFFICE OF THE CLERK

No. 07-146

In The

Supreme Court of the United States

DON JONES; VJ-2 DEVELOPMENT, INC.,

Petitioners,

v.

CITY OF McMINNVILLE, OREGON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN W. SHONKWILER
Attorney at Law
13425 SW 72nd Avenue
Tigard, OR 97223
Telephone: (503) 624-0917

Attorney for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

This case squarely presents the question of whether a municipality may escape compensatory responsibility for a regulatory "taking" of real property (where the land-use regulation precludes all economic uses) by merely allowing the citizens of the city to vote against annexation and development of real property. This use of voter-approved annexations and land-use development is utilized in many municipalities, not only throughout the State of Oregon, but also throughout the United States.

Petitioner Don Jones and his development company, VJ-2 Development, Inc., owners of the property, brought this action against the City of McMinnville contending that the Respondent City's restrictive zoning of Petitioners' property held in an "urban growth boundary" but outside the City's municipal boundaries, and ten denials of applications for annexation, prevented Petitioners from making any economically beneficial use of their property, that is to leave their property economically idle, in violation of both the Fifth Amendment to the U.S. Constitution and Article I, Section 18 of the Oregon Constitution. Petitioners also contend that the Respondent City's actions violated Petitioners' constitutionally protected rights of due process and equal protection, and violated state and federal antitrust laws. The questions presented are:

1. Where a municipality's land-use regulations preclude all economically beneficial use of real property by holding the property in a restrictive urban growth boundary, preclude all annexation and development of the property through citizen voter denials of such annexations and the municipality asserts that these restrictive regulations

QUESTIONS PRESENTED FOR REVIEW – Continued

are not a step in a plan to acquire the property, is this limitation a violation of just compensation under the Fifth and Fourteenth Amendments of the U.S. Constitution and Article I, Section 18 of the Oregon Constitution?

2. Where landowner-developer's applications for annexation-development of real property are treated differently than other similarly situated real properties by a municipality, and the "gravamen" of these municipal actions are directly related to a state statute of limitations for interferences with real property, can the federal court validly hold that the landowner-developer is not in a "class of one" for purposes of equal protection and that only a state personal injury statute applies to equal protection violations?

3. Where a landowner has raised state and federal constitutional compensatory "taking" claims, is the landowner precluded from also raising state and federal constitutional substantive due process and equal protection claims even though the remedies for the injuries to the landowner are different?

4. Where mandatory state statutes establish minimum procedural requirements for municipal land-use annexations that were not followed and the actions engaged in by the municipality were a "sham" – denying meaningful access to the appropriate city administrative and legislative fora, is the municipality precluded from entitlement to a "state action exemption" under the antitrust laws?

QUESTIONS PRESENTED FOR REVIEW – Continued

5. May a federal district court accept transfer of a state court proceeding, or fail to exercise abstention, when the alleged state and federal constitutional claims for inverse condemnation, due process and equal protection violations, as well as alleged antitrust violations, have not yet satisfied the second prong for the "ripeness" test as set forth in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), have not also satisfied the first prong of this "ripeness" test in that a final land-use decision has not been completed on portions of the landowners' claims, and each of the landowners' claims raise issues of first impression for the state supreme court?

PARTIES TO THE PROCEEDING

The action contains the names of all parties to this proceeding.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	vii
DECISIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE	1
STATEMENT OF THE CASE	2
A. Procedural History	2
B. The Case	3
REASONS FOR GRANTING THE WRIT	10
I. REGULATORY "TAKING": THIS CASE INVOLVES AN IMPORTANT CONSTITUTIONAL QUESTION THAT SHOULD BE RESOLVED BY THIS COURT – MAY LOCAL GOVERNMENTS AVOID HAVING TO PAY JUST COMPENSATION, WHERE LAND USE REGULATIONS PRECLUDE ALL ECONOMICALLY BENEFICIAL USES OF PROPERTY, MERELY BECAUSE THE GOVERNMENTAL DECISION WAS BY A VOTE OF THE CITIZENS AND ALLEGEDLY WAS NOT A STEP IN A "PLAN TO ACQUIRE THE PROPERTY"	10
II. EQUAL PROTECTION: THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT, AND OTHER STATE AND FEDERAL COURTS, REGARDING WHETHER A LANDOWNER-DEVELOPER QUALIFIES AS A "CLASS OF ONE" AND WHICH STATUTE OF LIMITATIONS SHOULD BE APPLIED FOR UNEQUAL TREATMENT OF SIMILARLY SITUATED PROPERTIES	13

TABLE OF CONTENTS – Continued

Page

III. DUE PROCESS: THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT REGARDING THE RAISING OF A SUBSTANTIVE DUE PROCESS CLAIM ALONG WITH OTHER CONSTITUTIONAL CLAIMS 19

IV. ANTITRUST: THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT REGARDING CONSIDERATION OF MANDATORY STATE STATUTES IN DETERMINING ENTITLEMENT TO A "STATE ACTION EXEMPTION" 24

V. REMAND AND ABSTENTION: THE NINTH CIRCUIT'S RULING IS IN CONFLICT WITH THE DECISIONS OF THIS COURT FOR ESTABLISHING RIPENESS OF FEDERAL CLAIMS, RIPENESS REQUIREMENTS FOR A STATE REGULATORY JUST COMPENSATION CLAIM, AND ABSTENTION WHERE THE CLAIMS ARE NOT "RIPE" AND RAISE ISSUES OF FIRST IMPRESSION FOR THE APPLICABLE STATE COURT 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996) 19

Bannum, Inc. v. City of Louisville, 958 F.2d 1354 (6th Cir. 1992) 14

Barbaccia v. County of Santa Clara, 451 F.Supp. 260 (N.D. Cal. 1978) 17

Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988) 23

Bear Creek Valley Sanitary Authority v. City of Medford, 130 Or.App. 24, 880 P.2d 486 (1994) 29

Boise Cascade Corp. v. Board of Forestry, 131 Or.App. 538, 886 P.2d 1033 (1994) 11, 12, 16

Boise Cascade Corp. v. Board of Forestry, 325 Or. 185, 935 P.2d 411 (1997) 11, 12, 16

Burford v. Sun Oil Company, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943) 29

Cape v. City of Beaverton, 187 Or.App. 463, 680 P.3d 261 (2003) 21, 22, 30

Carpinteria Valley Farms, Ltd. v. County of Santa Barbara, 344 F.3d 822 (9th Cir. 2003) 15

Cedar-Riverside Associates, Inc. v. United States, 459 F.Supp. 1290 (D. Minn. 1978), *affirmed*, 606 F.2d 258 (8th Cir. 1979) 25

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 17

Cerenghino v. State Highway Comm., 230 Or. 439, 370 P.2d 694 (1962) 16

City of Columbia v. OMNI Outdoor Advertising, 499 U.S. 365, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991) 25

TABLE OF AUTHORITIES – Continued

Page

Dan Gile and Associates, Inc. v. McIver, 113 Or.App. 1, 831 P.2d 1024 (1992) 22, 30

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) 25

England v. Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964) 29

Forseth v. Village of Sussex, 199 F.3d 363 (7th Cir. 2000) 14

Holdner v. Columbia County, 51 Or.App. 605, 627 P.2d 4 (1981) 17

Lingle v. Chevron, 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005) 21

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) 13, 16

Moeller v. Multnomah County, 218 Or. 413, 345 P.2d 813 (1959) 11

Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999) 27

Nolan v. California Coastal Comm'n, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) 12

Palazzolo v. Rhode Island, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001) 27

Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943) 24

Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 680 L.Ed.2d 420 (1981) 27

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922) 12

TABLE OF AUTHORITIES – Continued

Page

Railroad Commission v. Pullman, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) 29

Reserve, Limited v. Town of Longboat Key, 17 F.3d 1374 (11th Cir. 1994) 15

Rolf v. City of San Antonio, 77 F.3d 823 (5th Cir. 1996) 14, 20

Schoonover v. Klamath County, 105 Or.App. 611, 806 P.2d 156 (1991) 12

Southern Motor Carrier's Great Conference v. United States, 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985) 25

Staub v. City of Baxley, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958) 21

Stauffer v. Town of Grand Lake, Colo., 1981-1 Trade Cases (CCH) Par. 64, 029 (1980) 25

Suess Builders Co. v. City of Beaverton, 294 Or. 254, 656 P.2d 306 (1982) 15

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997) 27

Thornburg v. Port of Portland, 233 Or. 178, 376 P.2d 100 (1962) 11

Town of Hallie v. City of Eau Claire, 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985) 24

United States v. Dickinson, 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947) 17

Village of Willowbrook v. Olech, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) 14, 19

TABLE OF AUTHORITIES – Continued

Page

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) 20, 27, 28, 29

Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) 15

CONSTITUTIONS

U.S. Const. amend. V 1, 20, 27

U.S. Const. amend. XIV ..... *passim*

Or. Const. Article I, Sec. 20 ..... 13, 15, 16, 18, 26

STATUTES AND RULES

15 U.S.C. Secs. 1 & 2 ..... 2, 24, 25

28 U.S.C. Sec. 1254(1) 1

42 U.S.C. Sec. 1089 1

42 U.S.C. Sec. 1983 ..... 1, 21

Oregon Revised Statutes 12.080 ..... 2, 15, 19, 20

Oregon Revised Statutes 12.110 15

Oregon Revised Statutes 197.015 30

Oregon Revised Statutes 197.307 ..... 2, 21, 22, 23

Oregon Revised Statutes 197.522 ..... 2, 21, 22, 23

Oregon Revised Statutes 197.752 ..... 2, 21, 22

Oregon Revised Statutes 227.173 ..... 2, 21, 22, 23

Sup. Ct. R. 10.1 10

DECISIONS BELOW

The opinion of the Ninth Circuit Court of Appeals, not to be published, appears in Appendix (App.) A. The opinions of the District Court for the District of Oregon appears in Appendix B and C.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 9, 2007. This Petition for Certiorari was filed within 90 days of that date. This Court has jurisdiction over this matter pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this matter are the Fifth and Fourteenth Amendments to the United Constitution. The Fifth Amendment provides in part: "[N]or be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." The Fourteenth Amendment provides in part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

The provisions at issue in the United States Code, are Title 42, Section 1089 (due process requirements) and Section 1983 (civil action for deprivation of rights): "Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." The United States Code, Title 15, Sections 1 and 2 (the Sherman Act) are also at issue in this case.

The statutes at issue are Oregon Revised Statutes (ORS) 12.080 (statue of limitations), 197.307 (requiring clear and objective standards for approval or denial of needed housing), 197.522 (requiring conditions of approval for land use permit decisions), 197.752 (requiring vacant lands within an adopted urban growth boundary to be available for development if concurrent with urban facilities and services), and 227.173 (setting minimum due process standards for approval or denial of land-use permit decisions, including annexations). The relevant portions of the statutes are set out at Appendix G. The relevant portions of the Respondent City of McMinnville ("City") comprehensive plan and ordinances are set out at Appendix H.

STATEMENT OF THE CASE

A. Procedural History

This action was originally filed on December 3, 2003 in state circuit court for Yamhill County, Oregon; and subsequently removed to federal court by the City. Petitioners' motion to remand back to state court was denied by the federal district court for the District of Oregon on April 20, 2004. Upon motion for summary judgment by Respondent, the District Court granted summary judgment and dismissed all of Petitioners' state and federal claims. Petitioners appealed the ruling to the Ninth Circuit Court of Appeals. On May 9, 2007 the Court of

Appeals upheld the District Court's Order granting summary judgment.

B. The Case

As a preliminary summary, this is a case in which everyone, including the City's officials, acknowledge that Petitioners have been wronged. The uncontested record establishes: (1) there were no "legal defects" (City Attorney), no conflict with a "governmental, land-use, or public health, safety or welfare" (City Counselor and Public Works Director), and no reasons for denial of the annexation requests; (2) the City's procedures for approving or denying annexations is flawed because at the "voter" stage of the process there are "no standards" required for decision-making (City Counselor and City Attorney); (3) there was no rational basis for denying any of the annexation requests (City Officials); and (4) Petitioners' annexation-development plans were considered "fabulous" (City Counselor), "excellent" (Planning Director), a "great vision for the community" (Mayor), and the "finest piece of planning we've seen come into the city" (City Attorney).

Prior to Petitioners acquiring their property, the City had entered into an urban growth boundary management agreement with the County of Yamhill that required all property within the UGB to be first annexed to the City before such property could be developed for urban uses and be connected to urban facilities and services. In 1994, Petitioners became the owners of approximately 219 acres of land located west of the Respondent City of McMinnville ("City"). Petitioners develop property elsewhere in the State of Oregon and are not "local" developers in the City. The Petitioners' property was located within the City's

Urban Growth Boundary (UGB), but outside and adjacent to the City's political boundary. App. I-49-50, App. G-163.

By the time Petitioners acquired their property, the City had extended water and sewer lines out to the property specifically designed to accommodate future urban development of this UGB property. The City induced Petitioners into purchasing the property by representing that the property had adequate public facilities and services to allow full urbanized development of the property, and that the property was ready for immediate annexation and development. Relying upon these representations, the Petitioners purchased the property and subsequently submitted development plans and applications to the City. App. I-51, App. O-164. The City, however, subsequently adopted a City Charter Amendment to prevent annexations without an approval vote of the City's citizens. Prior to passage of the City's Charter amendment, the City wrongfully induced Petitioners into delaying filing Petitioners' annexation application to the City until after passage of the City Charter Amendment. App. P-301-302.

In a letter dated January 3, 1996 from the City's Manager to the City Council, the City Manager stated his opposition to the City's allowance of citizens to vote on annexations by stating "But it also opens the door to rejection of valid annexation requests that comply with all land-use plans because a segment of voters may not like certain housing types, e.g., apartments, manufactured housing, low and moderate income housing." App. O-311-312. Similarly, a letter dated January 4, 1996 from the Planning Director to the City Council further specified the inherent conflict between voter-authorized annexations and statewide planning laws:

> "One of the problems with annexation by popular vote is that some of those safeguards would be removed. Annexations could and probably would, become very political – in some cases a popularity contest, and in the worst case, a form of racial or economic discrimination. The way the system works now, annexations and subsequent rezoning and subdivision applications go through a high level of scrutiny and must meet specific clear and objective standards. This protects both the applicant, who knows going in what the rules and standards are, and the surrounding property owners, who know under what conditions the property can be developed. Once development proposals are required to gain the approval of the general public, it will be very difficult to adhere to a specific set of clear and objective standards." App. O-313-316.

Correspondingly, the Oregon Department of Land Conservation and Development (the state's land-use regulatory body) has supported proposed legislation to prevent citizen voting on annexations (including the charter amendment process in the City) because such activity has the potential of violating or conflicting with Oregon's land-use regulatory process. App. O-306-310.

Desiring to develop their property, the Petitioners filed a series of ten separate annexation requests over the years with the City, all of which were denied or delayed indefinitely without decision. App. P-300-303. Each of the Petitioners' annexation and development plans submitted to the City were of the highest-quality and provided numerous significant amenities for the public. The City officials admitted in depositions that all of Petitioners' development plans were excellent (Planning Director), "fabulous" plan (City Councilor), a "great vision" (Mayor),

the "finest piece of planning" (City Attorney). Furthermore, the City adopted findings that each of Petitioners' ten annexation applications satisfied all the city's and state's land-use requirements for approval. App. P-304-305. The City Attorney testified that there were no defects to support the annexation denials, and a City Councilmember testified that there was "no compelling governmental reason" not to approve the annexations. Similarly, the City Public Works Director testified that there was no "public health, safety or land use requirement that would have formed a sound basis for denial" of the Petitioners' annexations. App. P-304-305.

Petitioners originally sought their first annexation for 17.2 acres of land. The Mayor and the City Council members denied that annexation and required Petitioners to create a master land-use plan for Petitioners' entire property before they would reconsider annexing any part of that property. Petitioners were induced into delaying filing the annexation application to comply with the requirement. The City had become aware that an amendment to the City's Charter was being proposed that would require approval of annexations only through a vote of the City's citizens. Thereafter, the Mayor and City Council speeded other similarly situated annexation applications through to final approval just before the proposed charter amendment requiring citizen vote for annexations was ultimately passed by the voters. The City did not make this expedited annexation practice available to Petitioners, and the delay in Petitioners' annexation applications caused Petitioners' property to be subject to the new charter amendment requiring a vote of City's citizens. App. P-296-297, 301-302, App. O-286.

Petitioners filed another annexation application in 1996 with the City seeking to annex 179.4 acres of land. However, the City passed a motion to continue review to a future but undisclosed date, and the annexation was never decided (still pending as of today). Petitioners then filed another annexation in 1997 for 171.6 acres of land. During the annexation proceedings, the McMinnville School District declared that it wanted to acquire approximately ten acres of Petitioners' land for a future school location by dedication and that Petitioners had not yet agreed to provide the School District with that acreage. On November 4, 1997, the City's citizens voted to deny this annexation.

In December of 1998, Petitioners submitted two more annexation applications to the City for 93.4 acres and 78.2 acres. The City's planning commission recommended approval of both annexation applications, but when the matter was presented before the City Council the City Council remanded the matter back to the planning commission. This resulted in an inexplicable delay by the City and the Petitioners were not able to have a public hearing on their annexation requests until the next year when they were resubmitted by the City without any changes from the original applications. These relabeled annexations were eventually denied by the voters in 1999. Thereafter, Petitioners submitted another annexation request which reduced the annexation parcel size to only 65 acres. This was approved by the City Council on February 22, 2000, but was rejected by the voters on May 23, 2000. Throughout this whole annexation review process the City voters regularly approved other annexations of similarly situated properties. App. P-302-304. None of City voters' annexation denials were based on any reasonable or rational standards. App. P-304-305. They were simply a

"yes or no" public decision. However throughout each of the annexation denials, the denials of Petitioners' property directly caused the City to fail to achieve a continuous five-year supply of buildable land as required under provisions of the City's Comprehensive Plan, Oregon statutes and the compliance acknowledgment order from the Land Conservation and Development Commission ("LCDC"). App. P-300.

The City has had the same Mayor for the last 20 years (which includes all the time that Petitioners have sought land-use approvals before the City). The Mayor has been a plumbing and heating business contractor since the 1970's and he has had a business relationship with Petitioners' development competitor ("Mr. Ruden"). The Mayor also had hired Mr. Ruden to construct the Mayor's new personal residence during the same approximate time that the Petitioners submitted their annexation requests to the City. Mr. Ruden is a developer of land in and around the City since the 1980's. A portion of the property belonging to Petitioners, that was repeatedly denied annexation while in the Petitioners' ownership, eventually was acquired by Mr. Ruden. An additional portion of Petitioners' property was subsequently acquired by the City's school district. Both of these properties were subsequently and expeditiously annexed into the City by Mr. Ruden and the school district in 2003. App. P-300-302. In direct contrast, the Mayor and a member of the City Council testified that the development plans by Mr. Ruden were considered significantly inferior to the Petitioners' plans and the School District actually eliminated needed residential lands.

Having exhausted all possible methods of developing their property through annexation, on June 11, 2003,

Petitioners applied to the City for authorization to extend the City's public facilities and services (outside the City's political boundaries) to the Petitioners' property and to modify the UGB Agreement (to allow extraterritorial extension of public facilities/services and land-use approvals of the Petitioners' property at urban densities). This was the only remaining method that Petitioners could use to develop their property. On July 8, 2003, the City refused Petitioners' application for extension of the City's public facilities and services and refused to allow urban development of the property while it remained outside the City's political boundary. Just prior and shortly thereafter, the City approved extraterritorial extension of public facilities and services (without requiring annexation) to other properties that were similarly situated (like Petitioners' property).

Petitioners brought this action in state circuit court seeking declaratory and injunctive relief; and damages for inverse condemnation, due process violations, equal protection violations, civil rights violations, violations of the antitrust laws and damages in excess of 38 million dollars. The primary claims for relief are based upon state constitutional or state statutory provisions and the secondary claims for relief, the federal claims, "mirror" the respective state constitutional and statutory claims. App. I-49-68. The City removed the case to federal court and the District Court for Oregon denied Petitioners' motion for remand and dismissed Petitioners' federal "takings" claim on April 20, 2004. App. C. Thereafter, the City's motions for summary judgment were granted by the District Court and affirmed by the Ninth Circuit Court of Appeals. App. B and A.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(a) lists among the considerations governing review on certiorari the circumstance when a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question a way that conflicts with a decision by a state court of last resort; or sanctioned such departure by a lower court, as to call for an exercise of this Court's supervisory power. Under Rule 10.1(c), a ground for review exists when a United States court of appeals has decided important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with applicable decisions of this Court. All of these grounds for review are present in this case.

I. REGULATORY "TAKING": THIS CASE INVOLVES AN IMPORTANT CONSTITUTIONAL QUESTION THAT SHOULD BE RESOLVED BY THIS COURT – MAY LOCAL GOVERNMENTS AVOID HAVING TO PAY JUST COMPENSATION, WHERE LAND USE REGULATIONS PRECLUDE ALL ECONOMICALLY BENEFICIAL USES OF PROPERTY, MERELY BECAUSE THE GOVERNMENTAL DECISION WAS BY A VOTE OF THE CITIZENS AND ALLEGEDLY WAS NOT A STEP IN A "PLAN TO ACQUIRE THE PROPERTY."

Petitioners presented unrefuted evidence below that Petitioners could not make any economic use of their property under the City's exclusive farm use zoning and the urban growth boundary reserve requirements. For the next ten years, Petitioners were not allowed to annex their property into the City boundaries to allow urban

development. In 2003, Petitioners sought approval for the one remaining potential avenue for developing their property, i.e. approvals for extension of public facilities and services outside the City's boundaries and authorization for urban development. The City denied these last requests and the Petitioners' have been unable to make any economic use of their property since the acquisition in 1994. Petitioners then sought just compensation for the regulatory "taking" of their property.

Here, the federal court of appeals held that a compensatory "taking" claim under the Oregon Constitution is allowed only if the state regulation "is a step in a plan to acquire the property for public use." This ruling is in conflict with decisions of the Oregon Supreme Court and sanctions such a departure by a lower court as to call for an exercise of this Court's supervisory power, particularly in light of the lower federal court's dismissal of the Petitioners' federal regulatory "takings" claim.

First, the Oregon Supreme Court has not required that a city conduct a step in a plan to "acquire" a property for public purpose to establish a compensatory *regulatory* "taking." That is a requirement that arises out of "eminent domain," not "inverse condemnation." *Boise Cascade Corp. v. Board of Forestry,* 325 Or. 185, 935 P.2d 411, 422 (1997). *Thornburg v. Port of Portland,* 233 Or. 178, 376 P.2d 100 (1962). *Moeller v. Multnomah County,* 218 Or. 413, 345 P.2d 813 (1959). Specifically, the Oregon supreme court has interpreted the Oregon "taking" clause as allowing *two* types of inverse condemnation: (1) anticipated or actual "physical" takings, and (2) "regulatory" takings. "Physical" takings involve a step in a plan to "acquire" a property for public purpose. "Regulatory" takings only require that the governmental regulatory acts interfere with property

rights/uses and deprive the owner of all economically viable use of the property. *Boise Cascade Corp. v. Board of Forestry,* 325 Or. 185, 935 P.2d 411, 419-420 (1997).

Second, the federal court of appeals in its summary judgment ruling relied upon inapplicable *dicta* in the decision of *Schoonover v. Klamath County,* 105 Or.App. 611, 806 P.2d 156, 158 (1991) for the premise that a landowner cannot bring a "taking" claim for merely being denied an annexation and that a compensatory governmental regulation must be a step in a plan to acquire the property for public use. However, that premise is not the actual ruling of the case. The *Schoonover* landowner brought a "taking" claim upon the allegation that the denial of annexation of his property to a fire district caused him to be deprived of the "highest and best use" for his property. The Court of Appeals rightfully pointed out that the standard under the Oregon Constitution is for a loss of all economic use: "[i]t did not preclude plaintiff from use and enjoyment of the property in any number of *other* uses consistent with its zoning (emphasis added)." *Id.* at 158. In direct contrast, Petitioners in the present case have alleged that they have lost *all* economic use of their property. The critical issue is not whether the city "wants" to take the property for public purpose. The critical question is whether the activities of the City denied Petitioners all economic and beneficial or productive use of their land. *Nolan v. California Coastal Comm'n*, 483 U.S. 825, 834, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987).

The Supreme Court has long held "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922). As in the present case where the Petitioners' land

was held in a urban growth boundary area that precluded development, the Supreme Court has held "regulations that leave the owner of land without economically beneficial or productive options for its use – typically, as here, by requiring land to be held substantially in its natural state – carry with them risks that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798, 814 (1992), where the Court also held that: "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." The *Lucas* case, as here, involved a governmental land-use regulation and a citizen vote that together deprived Petitioners of *all* economic use of the property.

II. EQUAL PROTECTION: THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT, AND OTHER STATE AND FEDERAL COURTS, REGARDING WHETHER A LAND-OWNER-DEVELOPER QUALIFIES AS A "CLASS OF ONE" AND WHICH STATUTE OF LIMITATIONS SHOULD BE APPLIED FOR UNEQUAL TREATMENT OF SIMILARLY SITUATED PROPERTIES.

Addressing the Petitioners' state and federal constitutional Equal Protection claims (Article I, Section 20 of the Oregon Constitution and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution), the Ninth Circuit Court of Appeals affirmed a lower court's ruling that Petitioners were not part of a "suspect classification," that their allegations were barred by a two-year

statute of limitations and that the timely allegations were not evidence that the City intentionally discriminated against Petitioners. All of these determinations are in error and raise important questions of federal law.

"Class of one." The federal District Court denied Petitioners' equal protection claim on the ground that they were not part of a "suspect classification." The Ninth Circuit Court of Appeals affirmed that decision but focused upon different issues (statute of limitations). In *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000), however, the Court held that:

> "Prior cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment (Citations omitted) . . . [T]he purpose of the equal protection clause of the 14th Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of the statute or by its improper execution by duly constituted agents (citations omitted)." *Id.* 120 S.Ct. at 1074-1075.

The Court noted that "These allegations, quite apart from the Village's subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis." *Id.* 120 S.Ct. at 1075.[1]

---

[1] See also, *Bannum, Inc. v. City of Louisville*, 958 F.2d 1354 (6th Cir. 1992) where the city had denied plaintiff's community training center approval while approving similar group residential users elsewhere in the city; *Rolf v. City of San Antonio*, 77 F.3d 823 (5th Cir. 1996) where the federal court upheld an Equal Protection damages claim against a city. *Id.* at 828. See also, *Forseth v. Village of Sussex*,

(Continued on following page)

Statute of Limitations. The federal District Court and the Ninth Circuit Court of Appeals wrongfully imposed a two-year statute of limitations to the governmental acts that are challenged by the Petitioners' Equal Protection claim. Both courts relied upon ORS 12.110(1) by characterizing the Petitioners' claims as "torts" or "personal injuries." The lower federal courts applied the wrong statute of limitations.

The Oregon Legislature has enacted ORS 12.080(3) as a statue of limitations specifically for "interference with or injury to *any interest* of *another* in real property (emphasis added)." ORS 12.080(3) provides that such claims "shall be commenced within *six years* (emphasis added)." By comparison, the decision in *Wilson v. Garcia,* 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) focuses on applying a two-year statute of limitations where the gravamen of the claim lies in recovery damages for "personal" injuries. The Oregon Supreme Court has interpreted this statute [ORS 12.080(3)] as applying where a *landowner* seeks damages for interference by a local government with *his* rights that involved property, including both inverse condemnation and other related constitutional violations. *Suess Builders Co. v. City of Beaverton*, 294 Or. 254, 656 P.2d 306, 314-315 (1982). Furthermore, the Oregon Supreme Court has held that the Petitioners' type of claims are *direct actions under*

---

199 F.3d 363 (7th Cir. 2000) where municipality delayed land-use approvals while seeking to cause the plaintiff to convey a portion of his property to city official; *Carpinteria Valley Farms, Ltd. v. County of Santa Barbara*, 344 F.3d 822 (9th Cir. 2003) where county repeatedly delayed plaintiff's residential permits and induced him to withdraw review of city decisions; *Reserve, Limited v. Town of Longboat Key*, 17 F.3d 1374 (11th Cir. 1994) permits for residential multifamily revoked by city.

the Constitution, and therefore "these are not tort actions." *Cerenghino v. State Highway Comm.*, 230 Or. 439, 443, 370 P.2d 694 (1962).

Indeed, injuries to a landowner's property rights frequently are not ascertainable at the time the regulatory decision is made, but arise later when the effects of the regulation are carried out. In contrast, a person who is physically injured can determine within a short period of time the extent of those personal injuries. The Oregon Legislature and courts have recognized that injuries to an individual's rights involving property require a longer statute of limitations (six years instead of two years) because of this inherent delayed impact or injury:

> "The adjudication . . . will generally be dependent on a showing of facts *that cannot even be known at the time that the regulatory decision is made*, *e.g.*, the scope of the regulation's impact on a particular landowner's ability to make viable economic use of particular land. . . ." (Emphasis added). *Boise Cascade Corp. v. Board of Forestry*, 131 Or.App. 538, 886 P.2d 1033, 1040 (1994).

In the context of an Equal Protection claim, a landowner's injury may not be discovered or incurred until the city allows a use on other similarly situated property that was previously denied the landowner. See also, *Lucas v. South Carolina Coastal Council, supra*, where the Court noted that "So also does the fact that other landowners similarly situated, are permitted to continue the use denied to the claimant."

Continuing interferences. The Petitioners' Complaint at Paragraph 6 C, page 6, specifically alleges "Defendant's conduct has continued to interfere with plaintiffs' rights and the use and enjoyment of plaintiffs' property continuously until the date of trial." App. I-55.

Compensable interferences with property rights may be continuous and the tolling of an applicable statute of limitations must also be on a "day to day" basis. *United States v. Dickinson,* 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947); *Barbaccia v. County of Santa Clara,* 451 F.Supp. 260 (N.D. Cal. 1978). See also, *Holdner v. Columbia County,* 51 Or.App. 605, 627 P.2d 4 (1981). The determination of the continuing violation is a question of fact for the jury. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Evidence City treated Petitioners differently from others similarly situated. Petitioners set forth in the proceedings below ten separate events where the City imposed requirements on Petitioners' property, or development restrictions, that were not applied on other properties similarly situated. App. P-296-298, 300-302, 304-305. One event identifies that the City only required Petitioners to submit a master-plan for their property and delayed the annexation application. Provision of a master-plan was *not* required under the City's ordinances and the City did *not* require Mr. Ruden (competitor developer who subsequently acquired part of Petitioners' property) to comply with a master plan in Mr. Ruden's annexation in 2003. Another event identifies that the City only required Petitioners to provide mixed uses and large open space in the proposed annexation area. This was *not* required of any other annexations to the City, and in particular the Petitioners' former property after it was acquired by Mr. Ruden and annexed in 2003. App. O-176, App. N-108-109, App. N-133-138. Other events involved the City consistently approving annexations of both large and small parcels, including those of the school district and Mr. Ruden annexations in 2003, while consistently rejecting Petitioners' proposed annexations of both large and small parcels. App. O-286, 291. The City's Planning Director

testified that the city did *not* have any policy to limit annexations by parcel size. App. N-95. The City denied Petitioners' annexation applications but approved the school district property and Petitioners' competitor (Mayor's business associate) for the *same* property after the competitor acquired that property. App. O-176-178, App. N-110 and App. N-133-138.

Another event arises from the City approving extra-territorial extensions of public facilities and services to property owned by Mr. Ruden and the McMinnville School District that is outside city limits but within the UGB [App. O-188-192 (water and sewer), App. O-198 (storm and sanitary sewer), App. O-173-179], and this is not only a similarly situated property, it is the *same* property formerly owned by the Petitioners. Yamhill County subsequently approved extension of urban services, including roadways, to the competitor's property (previously owned by Petitioners and denied annexation while owned by Petitioners). App. O-173-179. Such authorized extension of services was therefore, pursuant to the terms of the Urban Growth Boundary Agreement, with the acquiescence of the City (who had final authority over such extensions). Five other events all pertain to the annexation process that the City utilized and which imposed unique restrictions only upon Petitioners and *not* upon others similarly situated.

The Ninth Circuit Court of Appeals rejected consideration of all of the Petitioners' events of Equal Protection violations on the grounds of being time barred, except for consideration of the extension of extraterritorial public services. As a result, the lower federal court utterly failed to consider the Petitioners' continuously delayed annexation application that was never decided by the City, and the annexations of Mr. Ruden and the school district, for

the same property that was denied annexation when it was owned by the Petitioners, and that were approved in 2003 after being purchased by Mr. Ruden and the school district. In addition, if the correct statute of limitations is the six years as set forth in ORS 12.080(3), then all of the Petitioners' events of Equal Protection violations would be timely for litigation. *Village of Willowbrook v. Olech, supra.*

III. DUE PROCESS: THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT REGARDING THE RAISING OF A SUBSTANTIVE DUE PROCESS CLAIM ALONG WITH OTHER CONSTITUTIONAL CLAIMS.

The right to raise separate constitutional violations. The Ninth Circuit Court of Appeals affirmed dismissal of Petitioners' substantive due process claims upon the grounds that "[A] plaintiff is precluded from asserting a substantive due process claim instead of, or in addition to, a takings claim." App. A-11. See, *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996). The Ninth Circuit's rule is in direct conflict with the decisions of this Court and other circuit courts that allow litigation for separate constitutional violations including substantive due process, equal protection violations and "taking" of property without just compensation, particularly where the related remedies are different. Here, the Petitioners have been forced to return ownership to their sellers of a portion of the restricted property (thereby inverse condemnation not being a complete remedy).

This Court has recognized that "taking" claims and substantive due process claims arise from different principles of law and involve different forms of injuries or

damages to a landowner. In *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108 at 3122, 87 L.Ed.2d 126 (1985) the Court summarize the differences between these constitutional claims as follows:

> "[U]nder that theory government regulation does not effect a taking for which the Fifth Amendment requires just compensation; instead, regulation that goes so far that it has the same effect as a taking by eminent domain is an invalid exercise of the police power, violative of the Due Process Clause of the 14th Amendment. Should the government wish to accomplish the goals of such regulation, it must proceed to the exercise of its eminent domain power, and, of course, pay just compensation for any property taken. The remedy for a regulation that goes too far, under the Due Process theory, is not a 'just compensation' but invalidation of the regulation, and if authorized and appropriate actual damages."

In *Rolf v. City of San Antonio*, 77 F.3d 823 (5th Cir. 1996) the landowners brought separately a claim for substantive due process, based on an allegation of retaliation, and a claim for denial of equal protection. The Fifth Circuit allowed both constitutional claims even though they arose out of the same events and injuries to the landowners. *Id.* at 828.

The application of the correct statute of limitations. The Ninth Circuit has ruled that all of Petitioners' federal constitutional claims (including the claims for Due Process) are barred by a two-year statute of limitations. Petitioners reassert here those same arguments and citations for the application of the six-year statute of limitations under ORS 12.080(3) as previously addressed in the second reason for granting this Petition. As a result,

all of Petitioners' annexations applications that were denied or indefinitely delayed by the City would have occurred within that six-year period.

The arbitrary and capricious City annexation decisions create actionable claims for substantive due process. The denial of Petitioners' ten annexation applications by the City involved no standards for those denials and the other landowners acquired approval of their annexations on similarly situated properties (in fact, on the same properties as previously owned by the Petitioners). Petitioners have separately alleged that these denials have violated their state and federal Due Process rights.

A lack of ascertainable standards is a violation of due process that is actionable under the Fourteenth Amendment, and 42 U.S.C. Sec. 1983 and the Oregon Constitution. In *Staub v. City of Baxley*, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958), the Court held that an ordinance of the city prohibiting solicitation of members by an organization without a permit and making it discretionary with the mayor and council as to whether to grant permit, without any definite standards or other controlling guides, is invalid as a violation of due process. See, *Lingle v. Chevron*, 544 U.S. 528, 125 S.Ct. 2074, 2084, 161 L.Ed.2d 876, 891 (2005) ["if a governmental action is found to be impermissible – for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process – that is the end of the inquiry"].

The Oregon Legislature has defined procedural processes that are required for approving or denying annexations under ORS Chapters 197, 215 and 227. As identified in the following section regarding "Antitrust," the Oregon courts have held in *Cape v. City of Beaverton*,

187 Or.App. 463, 466-470, 680 P.3d 261 (2003), that *any* annexation decision is a "land-use decision" and must meet all statutory requirements for a quasi judicial proceeding. A vote by the public does not turn a "quasi judicial" land use annexation decision into a "legislative" decision. The mandatory standards set forth in the statutes are still required. *Dan Gile and Associates, Inc. v. McIver*, 113 Or.App. 1, 831 P.2d 1024 (1992).

The City's voter annexation decisions violated the City's requirements for housing under ORS Chapters 197 and 227. Both the Oregon land-use statutory scheme and the City's Comprehensive Plan *require* the City to maintain a minimum continuous five-year supply of buildable land planned and zoned for all the City's needed housing. App. O-207 (Sec. 71.05), App. O-236. ORS 197.752(1). The City's repeated denials of the annexation of Petitioners' property caused the City to fail to meet requirements for needed housing. App. O-242-243, App. O-226, App. N-99 (insufficient by 2000). The City's voter annexation decisions violated the City's land-use requirements mandated under state statute. ORS 197.307(3)(a) requires that "When a need has been shown for housing within an urban growth boundary . . . needed housing . . . *shall be permitted* . . . with sufficient buildable land to satisfy that need." (Emphasis added). The City's own findings determined that there was a deficiency in residential housing acreage within the City's UGB that was roughly equivalent to the residential acreage being proposed for annexation by the Petitioners. ORS 227.173(3) requires that a city making its land use decisions, even for denial, *shall* make those decisions:

> "based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, state the

> facts relied upon in rendering the decision and explains the justification for the decision based upon the criteria, standards and the facts set forth."

ORS 197.307(3)(b) further requires: "A local government shall attach only clear and objective approval standards . . . in whole or in part . . . to an application for development of needed housing. . . ." ORS 197.307(6) also requires that "the procedures for approval adopted by a local government shall be *clear and objective* and may not have the effect either in themselves or cumulatively, *of discouraging needed housing through unreasonable cost or delay*." (Emphasis added). Finally, ORS 197.522 requires approval of all permits for subdivisions if they can include reasonable conditions to grant the permit. There is no evidence in the record to contravene the evidence that the City violated the state statutory requirements.

None of the ballot measures submitted to the voters, who ultimately denied Petitioners' annexations, included any reasonable standards for the voters to make those decisions. App. O-218-219, App. O-245-247, App. O-90-91. All of the Petitioners' annexation applications were denied by the voters of the City *without* any findings required to support those denials. ORS 227.173(1), ORS 197.307(6) and ORS 227.173(2). Where the government refuses to issue a land-use permit due to misapplying mandatory requirements, there is sufficient entitlement upon which to base a separate due process claim. *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988).

IV. ANTITRUST: THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT REGARDING CONSIDERATION OF MANDATORY STATE STATUTES IN DETERMINING ENTITLEMENT TO A "STATE ACTION EXEMPTION."

1. The necessary elements for "state action immunity." The Ninth Circuit held that the City is immune from Petitioners' antitrust claims through the "state action exemption" enunciated in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

However, this Court in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42, 105 S.Ct. 1713, 1718-1720, 85 L.Ed.2d 24 (1985) did not limit the state statutory inquiry, as did the Ninth Circuit in this case, to only the initial enacting statute for the governmental activity. This Court in *Hallie* did not require that the court must invariably conclude, regardless of the circumstances, that a broad mandate to act gives authority to prevent others from acting. This Court itself considered extraneous Wisconsin statutes on the subject of municipal sewer systems, as well as Wisconsin state court decisions, in evaluating Wisconsin's policies towards competition to understand the state's delegation in light of the state's general policy. Instead, the Ninth Circuit chose to restrict the review and not consider state statutes which set forth mandatory requirements for any governmental decision making on annexations. These mandatory statutory requirements, in essence, establish a limitation or restriction for the qualification of a state action exemption when a city grants or denies an annexation.

2. The City is not exempt from antitrust liability because the City engaged in conduct with a

private party to deny meaningful access to the appropriate city administrative and legislative fora – thereby establishing a "sham" exception. It is well established that where parties engage in conduct that deny meaningful access to the appropriate city administrative and legislative fora, the courts allow an exception to governmental immunity from antitrust litigation for a "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor in the application of the Sherman Act. . . ." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144, 81 S.Ct. 523, 533, 5 L.Ed.2d 464 (1961).[2] Petitioners had presented to the court evidence of the relationship between the governmental parties and the private parties for an anticompetitive purpose, and how they had abused the governmental "process" to prevent the Appellant (a competitor) from having meaningful access to the appropriate city administrative and legislative fora.[3]

The Mayor of the City testified that he is a plumbing and heating business contractor since the 1970's and that he has a business relationship with Alan Ruden. The Mayor also testified that he had hired Mr. Ruden to construct the Mayor's new personal residence. Mr. Ruden is a developer of land in and around the City since the

---

[2] The U.S. Supreme Court preserved this "sham" exception where it encompasses situations in which persons use the government "process" as an anticompetitive weapon. See, *City of Columbia v. OMNI Outdoor Advertising*, 499 U.S. 365, 111 S.Ct. 1344, 1354, 113 L.Ed.2d 382 (1991).

[3] See also, *Stauffer v. Town of Grand Lake, Colo.*, 1981-1 Trade Cases (CCH) Par. 64, 029 (1980); *Southern Motor Carrier's Great Conference v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985); *Cedar-Riverside Associates, Inc. v. United States*, 459 F.Supp. 1290 (D. Minn. 1978), *affirmed*, 606 F.2d 258 (8th Cir. 1979).

1980's. App. O-133-138. A portion of the property belonging to Petitioners, that was repeatedly denied annexation while in the Petitioners' ownership, eventually was acquired by Mr. Ruden. This same property formerly owned by Petitioners was subsequently annexed into the City by Mr. Ruden. App. O-132-135. The City's Mayor cast critical votes in denying and delaying Petitioners' annexation and development requests. The conduct that denied meaningful access to the appropriate city administrative and legislative fora in this case has been identified and specified with evidence in the preceding arguments pertaining to Petitioners' Equal Protection claim, and are reasserted here.

V. REMAND AND ABSTENTION: THE NINTH CIRCUIT'S RULING IS IN CONFLICT WITH THE DECISIONS OF THIS COURT FOR ESTABLISHING RIPENESS OF FEDERAL CLAIMS, RIPENESS REQUIREMENTS FOR A STATE REGULATORY JUST COMPENSATION CLAIM, AND ABSTENTION WHERE THE CLAIMS ARE NOT "RIPE" AND RAISE ISSUES OF FIRST IMPRESSION FOR THE APPLICABLE STATE COURT.

Motion to Remand. Petitioners moved to remand the entire case back to state court on the grounds that the federal claims were unripe and that the federal court should have declined to exercise supplemental jurisdiction. The Ninth Circuit held that the federal claims, excepting the federal "taking" claim, were "ripe" for review, and thereby, upheld the District Court's exercise of supplemental jurisdiction over the remaining state claims.

In reaching this ruling, the Ninth Circuit held that Petitioners' federal constitutional claims for Due Process, Equal Protection and corresponding Civil Rights are not subject to the second prong ripeness test set forth in

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186-88, 105 S.Ct. 3108, 3116-17, 87 L.Ed.2d 126 (1985). This Court articulated a two-pronged "ripeness" test of which *both* must be satisfied before federal inverse condemnation, due process, equal protection and civil rights claims will mature. The second prong requires that the plaintiffs seek a compensation claim in state court and that the claim be denied. *Williamson, supra,* 473 U.S. at 194, n. 13. See, *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448, 2458-2462, 150 L.Ed.2d 592 (2001); *Suitum v. Tahoe Regional Planning Agency,* 520 U.S. 725, 738, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997); *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999).

In direct conflict with the Ninth Circuit ruling, this Court in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 680 L.Ed.2d 420 (1981), applied ripeness requirements to federal Due Process Clause claims ruling that such claims were not "complete" until the state had failed to provide an adequate post-deprivation remedy. This minimum requirement for federal court review of federal constitutional claims would, logically, be extended to claims arising under the Equal Protection Clause. This Court in *Williamson* reaffirmed in the land-use context the ruling in *Parratt v. Taylor* that constitutional compensatory claims (other than federal "taking" claims under the Fifth and Fourteenth Amendments) are also not "ripe" for federal court review until the following test has been satisfied:

> "Thus, the State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate post-deprivation remedy for the property loss'." *Williamson, supra* 87 L.Ed.2d at 144.

Here, no final determinations of compensation claims for any of the federal constitutional claims have been decided by any court in the State of Oregon. The lower federal court has prematurely removed the state circuit court case before that state court decision could be rendered.

The Ninth Circuit's ruling is also in error for several other reasons. First, the District Court dismissal of Petitioners' federal "taking" claim as unripe for review was subsequently followed by dismissal of the state "taking" claim on summary judgment. The Ninth Circuit then affirmed the dismissal of both state and federal "taking" claims. However, once Petitioners' state "taking" claim was dismissed, Petitioners' federal "taking" claim would *automatically* become "ripe" for review. Second, both lower federal courts misapplied the first prong for ripeness review under *Williamson*, *supra*. One of the integral events giving rise to Petitioners' state and federal claims was that the City had failed to make any decision (final or otherwise) regarding Petitioners' annexation application originally filed in 1996 (ANX 10-96). Therefore, all of Petitioners' federal constitutional claims were not ripe for review by the federal court because the governmental entity charged with implementing the regulations had not " . . . reached a final decision regarding the application of the regulations to the property at issue." *Williamson*, *supra* 87 L.Ed.2d at 139.

Finally, the Ninth Circuit held that "*Williamson's* second prong does not mandate that available state remedies be pursued in state court." However, this Court held the opposite:

> "Likewise, because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision

> for obtaining compensation after the taking, *the State's action here is not "complete" until the State fails to provide adequate compensation for the taking.*" Emphasis added. *Williamson, supra* 87 L.Ed.2d at 144.

In essence, all of Petitioners' federal constitutional claims were not ripe for review and this case should have been remanded back to state court.

Abstention. Alternatively, Petitioners contended that the federal court should abstain from accepting jurisdiction until the conclusion of state claims in the state proceeding, primarily because each of Petitioners' claims raised or involved an issue of first impression for the state court.[4]

Petitioners' first claim was for declaratory judgment seeking that the state court determine the justiciable controversy arising from the conflict between the City's rights under the Oregon Constitution (to allow voter approval or denial of annexations) and the state legislative statutes which require compliance with statewide planning goals and procedures for all land-use decisions, including annexations. The Ninth Circuit cited *Bear Creek Valley Sanitary Authority v. City of Medford*, 130 Or.App. 24, 880 P.2d 486, 490 (Or.App. 1994) as authority that the state court had already decided this issue. However, *Bear Creek* held that a city does not have statutory authority (explicit or implied) to require consensual annexation for extension of sewer services into urban unincorporated areas inside the city's urban growth boundary. *Bear Creek*,

---

[4] *Railroad Commission v. Pullman*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); *Burford v. Sun Oil Company*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943); and *England v. Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964).

supra. The issue of a *combined* annexation decision by a City (a land use application decision and a separate voters' decision) that fails to comply with mandatory land-use statutory requirements was not addressed by that case. See also, *Dan Gile and Associates, Inc. v. McIver*, 113 Or.App. 1, 831 P.2d 1024 (1992) [the court held that, since the zone change *was* a "land-use decision," under the requirements of ORS 197.015(10)(a) the decision was not "legislative" but instead was "quasi judicial"].

Under Oregon law, an annexation is a "land-use decision" which requires both application of all statutory mandatory standards and the absence of a "political" decision. *Cape v. City of Beaverton*, 187 Or.App. 463, 466-470, 680 P.3d 261 (2003), where the court found that *any* annexation decision is a "land-use decision and must meet all statutory requirements for a quasi judicial proceeding. Thus, the issue is not whether the public can hold any vote on annexations. The issue is whether a city must still comply with the statutory land-use requirements for an annexation when *neither* the land-use hearing nor the citizens vote complied with those mandatory statutory requirements. That is an issue of "first impression" for the Oregon appellate courts.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN W. SHONKWILER
Attorney at Law
13425 SW 72nd Avenue
Tigard, OR 97223
Telephone: (503) 624-0917
Attorney for Petitioners

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DON JONES; VJ-2 DEVELOPMENT, INC., an Oregon corporation, Plaintiffs-Appellants, v. CITY OF McMINNVILLE, OREGON, an Oregon municipal corporation, Defendant-Appellee.	No. 05-35523 D.C. No. CV-04-00047-ALA **MEMORANDUM*** (Filed May 9, 2007)

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Argued and Submitted March 8, 2007
Portland, Oregon

Before: GOULD, PAEZ, and RAWLINSON, Circuit Judges.

Don Jones and VJ-2 Development, Inc. ("Appellants") appeal the district court's denial of their motion to remand and grant of summary judgment to the City of McMinnville ("City"). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm. Because the parties are familiar with the background of this case, we do not recite it here.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Cir. R. 36-3.

1. Motion to Remand

Appellants argue that their federal claims were unripe, and, therefore, that the district court should have dismissed these claims without prejudice, declined to exercise supplemental jurisdiction over the remaining state claims, and remanded the case to Oregon state court.

We review de novo a district court's denial of a motion to remand. *Harris v. Bankers Life & Cas. Co.,* 425 F.3d 689, 692 (9th Cir. 2005). We also "subject ripeness issues to de novo review." *Traweek v. City and County of San Francisco,* 920 F.2d 589, 593 (9th Cir. 1990). We conclude that the district court properly denied Appellants' motion to remand. Because five of Appellants' claims arose under federal law, the City properly removed the case to federal court. Further, because at least three of these federal claims were ripe, the district court properly declined to dismiss those claims and retained supplemental jurisdiction over Appellants' state law claims, which were also ripe.

Under the two-prong test set forth by the Supreme Court in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172 (1985), Appellants' federal takings claim was not ripe:

> Under *Williamson,* an as-applied takings claim is ripe only if the plaintiff can establish that (1) "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue," and (2) the claimant has sought "compensation through the procedures the State has provided for doing so."

Carson Harbor Vill., Ltd. v. City of Carson, 353 F.3d 824, 826 (9th Cir. 2004) (quoting *Williamson,* 473 U.S. at 194).

The parties agree that the City issued numerous final decisions, such that Appellants' claims satisfy *Williamson's* first prong, but Appellants concede that they have not sought just compensation for the alleged taking through available state procedures under Oregon law, which allows for inverse condemnation actions. *See Dodd v. Hood River County,* 59 F.3d 852, 859-61 (9th Cir. 1995). Thus, their federal takings claim was not ripe under *Williamson's* second prong, and the district court properly dismissed it without prejudice.

However, as the district court properly concluded, Appellants' state law takings claim was ripe. Under Oregon law, Appellants' state law takings claim is an action for inverse condemnation. *See Vokoun v. City of Lake Oswego,* 56 P.3d 396, 400-01 (Or. 2002). Thus, Appellants sought compensation through the available state procedure for obtaining relief, exactly as *Williamson* requires. Contrary to Appellants' argument, *Williamson's* second prong does not mandate that available state law remedies be pursued in state court. *Cf. Macri v. King County,* 126 F.3d 1125, 1129-30 (9th Cir. 1997) (holding that the district court properly remanded appellants' state law inverse condemnation claim, not because it was unripe, but because the court did not abuse its discretion in declining to exercise supplemental jurisdiction after dismissing all of appellants' federal claims); *Sinclair Oil Corp. v. County of Santa Barbara,* 96 F.3d 401, 408 (9th Cir. 1996) (holding that the district court properly dismissed appellant's state law inverse condemnation claim as unripe because it was barred under *Williamson's first* prong).

Appellants' federal and state equal protection and procedural due process claims, and state law substantive due process claim, were also ripe. We have held that "the final decision requirement [of *Williamson's* first prong] is applicable to substantive due process and equal protection claims brought to challenge the application of land use regulations, and is most likely applicable to related procedural due process claims." *Hoehne v. County of San Benito,* 870 F.2d 529, 532 (9th Cir. 1989) (citations omitted). However, we have limited *Williamson's* second prong to takings claims and their equivalents. *See Sinclair,* 96 F.3d at 405.

Here, Appellants' equal protection claims, alleging that the City "intentionally treated [them] differently from others similarly situated" by "exten[ding] public facilities" to similar parcels of land, are not mere reformulations of their federal takings claim. Likewise, to the extent Appellants set forth cognizable procedural due process claims, and a cognizable state law substantive due process claim, they are distinct from their federal takings claim.

Lastly, as explained below, it is immaterial whether Appellants' federal substantive due process claim was ripe or not, because the claim was barred under *Armendariz v. Penman,* 75 F.3d 1311 (9th Cir. 1996). In sum, the district court properly declined to remand Appellants' case to state court. Although Appellants' federal takings claim was not ripe, their federal procedural due process, equal protection, and antitrust claims were ripe, and, hence, the district court properly declined to dismiss those claims and exercised its discretion to maintain supplemental jurisdiction over Appellants' state law claims, which were also ripe.

2. Abstention

Because we can resolve Appellants' remaining claims without addressing doubtful issues of state law, the district court did not abuse its discretion in declining to exercise *Pullman* abstention. *See Smelt v. County of Orange,* 447 F.3d 673, 681-82 (9th Cir. 2006).

First, contrary to Appellants' argument, there is no unresolved issue of state law regarding the alleged conflict between the City's Charter Amendment, which allows the City's voters to veto proposed annexations, and Oregon's land use statutes, which require the City to comply with certain land use goals in making land use decisions. As the Oregon Court of Appeals has held:

> The decision by a city or other governing body that *proposes* an annexation is an act of planning that must comply with the land use laws; however, the subsequent acts that are necessary to *finally adopt or reject* the proposal, generally a popular vote under the ORS chapter 222 procedures, are not controlled by or subject to the land use laws.

Bear Creek Valley Sanitary Auth. v. City of Medford, 880 P.2d 486, 489 (Or. App. 1994) (emphases in original).

Second, although the Oregon courts have not expressly resolved the issue, it is doubtful that the state courts would veer from federal antitrust law and adopt a "conspiracy exception" to municipal immunity from state law antitrust claims. The Supreme Court firmly rejected such an exception to federal antitrust law in *City of Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365, 374-79 (1991), and, as we have previously noted:

> The Oregon antitrust statutes are almost identical to the federal antitrust statutes. *Compare* 15 U.S.C. §§ 1, 2 *with* Or. Rev. Stat. §§ 646.725, 646.730. In fact, Oregon courts look to federal antitrust decisions for "persuasive" guidance in interpreting the state antitrust laws. *See Willamette Dental Group, P.C. v. Oregon Dental Serv. Corp.*, 130 Or. App. 487, 882 P.2d 637, 640 (1994) (citing Or. Rev. Stat. § 646.715(2)).

Oregon Laborer-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 185 F.3d 957, 963 n.4 (9th Cir. 1999). Indeed, Oregon has adopted by statute the same test for municipal immunity applied by the federal courts. *See Pre-Hosp. Med. Servs., Inc. v. Malheur County*, 896 P.2d 585, 592 (Or. App. 1995) (citing Or. Rev. Stat. § 646.740). Also, the Oregon state courts have not mentioned the potential exception despite finding municipal immunity in a number of antitrust cases since *City of Columbia*. *See, e.g., id.*

3. Motion to Strike

Appellants also argue that the district court erred by granting the City's motion to strike, in part, an affidavit from Appellant Jones. We review for an abuse of discretion a district court's grant of a motion to strike. *Hambleton Bros. Lumber Co. v. Balkin Enters., Inc.*, 397 F.3d 1217, 1224 n.4 (9th Cir. 2005).

Because Jones' affidavit contradicted his deposition testimony and made conclusory allegations without establishing personal knowledge, the district court did not abuse its discretion in granting the City's motion to strike portions of the affidavit.

4. Summary Judgment

We review de novo a district court's order granting summary judgment to determine whether, viewing the evidence in the light most favorable to the non-moving party, any genuine issue of material fact exists and whether the court correctly applied the relevant substantive law. *F.T.C. v. Gill,* 265 F.3d 944, 954 (9th Cir. 2001).

a. Antitrust Claims

The district court properly dismissed Appellants' antitrust claims. A municipality is immune from federal antitrust liability where its actions restricting competition are authorized by state policy. *See City of Columbia,* 499 U.S. at 370. We apply a two-part test "to determine whether a 'clearly articulated' state policy has authorized a municipality's anticompetitive actions." *Trawick,* 920 F.2d at 591. "First, a court must determine whether the legislature authorized the challenged actions of the city. Second, the court must determine whether the legislature intended to displace competition with regulation." *Id.* at 591-92.

Here, the district court properly reviewed the relevant state statutes and correctly determined that they grant municipalities broad authority to engage in comprehensive land use planning, zoning, and annexation. *See* Or. Rev. Stat. §§ 195-197, 222. Further, Oregon requires municipalities to make land use decisions in compliance with a state-acknowledged plan. *See id.* § 197.175(2). The State has acknowledged the City's Land Use Plan, which expressly prohibits urban development of land not annexed to the City and precludes the City from extending urban services to such unincorporated land.

In light of these state policies, the City was entitled to immunity from Appellants' federal antitrust claim: the State authorized the City to make annexation decisions and limit urban development and services to annexed land, and anti-competitive conduct is a foreseeable result of this broad grant of land use planning authority. *See Traweek,* 920 F.2d at 593.

For the same reasons, the district court properly dismissed Appellants' state law antitrust claims. As noted, Oregon's antitrust statutes are identical to the federal antitrust statutes, Oregon's test for municipal immunity is the same as the federal test, and Oregon's courts look to federal antitrust law for persuasive guidance in interpreting state antitrust law.[1]

b. State Law Takings Claim

The district court also properly dismissed the City's state law takings claim. Article I, section 18 of Oregon's constitution provides that "Private property shall not be taken for public use . . . without just compensation." On facts very similar to the instant case, the Oregon Court of Appeals held that a regulation may constitute a taking under the State constitution if it "is a step in a plan to acquire the property for public use and denies the owner an economic use of the property pending its eventual

[1] Appellants also argue that the "sham exception," which the Supreme Court has recognized in certain antitrust cases, precludes immunity. However, the Court has not recognized this exception in the context of state or municipal immunity, known as "*Parker*" immunity; it has only recognized the exception in the context of "*Noerr-Pennington*" immunity, which applies to private parties and is based on distinct, First Amendment considerations. *See City of Columbia,* 499 U.S. at 380.

acquisition." *Schoonover v. Klamath County,* 806 P.2d 156, 158 (Or. App. 1991).

Here, there is no evidence that the City's regulations are "a step in a plan to acquire [Appellants'] property for public use." *See id.* ("Nothing in the record suggests, even remotely, that Klamath County imposed the contested condition as a step in a plan to acquire the property for public use. It merely regulated the private use of land by requiring annexation into a fire district as a condition to the development of the property as a subdivision."). *Cf. Suess Builders Co. v. City of Beaverton,* 656 P.2d 306, 310 (Or. 1982) ("The issue in this case, however, arises from a governmental plan to acquire private land for public ownership.").

c. Equal Protection Claims

We agree with the district court that Appellants' equal protection claims are largely time barred, and that the City did not intentionally discriminate against Appellants by denying their request to extend urban services to their unannexed property.

Because the statute of limitations for federal constitutional claims under 42 U.S.C. § 1983 is determined by the forum state's statute of limitations for personal injury actions, Appellants' federal equal protection claim is subject to a two-year statute of limitations. *See Sain v. City of Bend,* 309 F.3d 1134, 1139 (9th Cir. 2002) ("Oregon's two-year statute of limitations for personal injury actions applies to actions under 42 U.S.C. § 1983.") (citing Or. Rev. Stat. § 12.110(1)). Appellants' state law equal protection claim is also subject to a two-year statute of limitations. *See Medo-Bel Creamery, Inc. v. State By and*

Through Kunzman, 673 P.2d 537, 542-43 (Or. App. 1983). Thus, the district court correctly determined that Appellants' equal protection claims are time barred to the extent they are based on the City's denials of their annexation proposals from 1995 to 2001, but are not time barred insofar as they allege injury from the City's denial of their request to extend urban services in 2003.

Appellants' timely claims, however, are without merit. The parties agree that the analysis of Appellants' equal protection claims is the same under state and federal law. Appellants argue that they are members of a "class of one." We have held that, although a "successful equal protection claim may be brought by a class of one, the plaintiff still bears the burden of proving that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Thornton v. City of St. Helens,* 425 F.3d 1158, 1167 (9th Cir. 2005) (internal quotation marks omitted).

Appellants provide no evidence that the City intentionally discriminated against them in refusing to extend services to their unannexed property. Appellants allege that the City "approved extraterritorial extension of public facilities and services to property owned by [another private developer] and the McMinnville School District." Viewed in the light most favorable to Appellants, however, the record demonstrates only that the City considered extending services outside of city limits in order to support property already annexed to the City. Therefore, even assuming the City decided to extend services to these other property owners, Appellants were not similarly situated. In any event, the City had a rational basis for treating Appellants differently: the City's voters rejected

each of Appellants' annexation proposals that the City Council had approved.

d. Due Process Claims

To the extent Appellants set forth a cognizable procedural due process claim, it is based exclusively on the City's and the voters' denials of Appellants' annexation proposals; Appellants do not allege that the City denied them procedural due process in rejecting their request to extend services in 2003. Because the statute of limitations analysis for Appellants' due process claims is the same as for their equal protections claims, Appellants' procedural due process claim is time barred. *See Medo-Bel Creamery,* 673 P.2d at 542-43

Further, federal substantive due process claims are barred where the claimant could seek equivalent relief under constitutional provisions that provide more specific guarantees. *See Armendariz,* 75 F.3d at 1318-20; *see also Macri,* 126 F.3d at 1130 ("[A] more general substantive due process claim cannot be brought if the claim is based on governmental conduct which implicates an enumerated constitutional right."). We have broadly applied *Armendariz* in actions involving takings. *See, e.g., Buckles v. King County,* 191 F.3d 1127, 1137 (9th Cir. 1999) ("[A] plaintiff is precluded from asserting a substantive due process claim instead of, or in addition to, a takings claim."). Also, we have clarified that these substantive due process claims should be dismissed with prejudice. *See Sinclair,* 96 F.3d at 407 ("[T]he district court should amend its order to reflect that this count is dismissed with prejudice."). Because Appellants' federal substantive due process claim merely restates their takings and equal

protections claims, the district court properly dismissed the claim with prejudice.

Finally, to the extent it is not time barred, the district court properly dismissed Appellants' state law substantive due process claim, for the same reasons it dismissed Appellants' equal protection claims.

e. Civil Rights Claims

Appellants argue that they are entitled to relief for alleged civil rights violations claims only if they prevail on their other claims. In light of our disposition of Appellants' other claims, we also conclude that the district court properly dismissed their civil rights claims.

AFFIRMED.

***Jones v. City of McMinnville*, No. 05-35523**
Rawlinson, Circuit Judge, concurring:

I concur in the result.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DON JONES and VJ-2 DEVELOPMENT, INC., an Oregon corporation, Plaintiffs, vs. CITY OF MCMINNVILLE, an Oregon municipal corporation, Defendant.	Civ No. 04-0047-AA OPINION AND ORDER

John W. Shonkwiler
13425 S.W. 72nd Avenue
Tigard, OR 97223
Attorney for plaintiffs

Kari Z. Furnanz
James P. Martin
Hoffman, Hart, & Wagner
Twentieth Floor
1000 S.W. Broadway
Portland, Oregon 97205
Attorneys for defendant

AIKEN, Judge:

Don Jones and VJ-2 Development (plaintiffs) sued the City of McMinnville after plaintiffs sought and failed to annex several parcels of property west of McMinnville to the City and obtain City services. Plaintiffs filed this action in Circuit Court for the State of Oregon for the County of Yamhill on December 10, 2003, alleging federal and state antitrust violations, denial of plaintiffs' civil

rights and "takings" under the United States and Oregon Constitutions, and statutory violations under Oregon law. Pursuant to 28 U.S.C. §§ 1441 and 1446, defendant removed the case to the United States District Court for the District of Oregon. This court denied plaintiffs' motion to remand the proceeding back to state court and dismissed plaintiffs' federal takings claim. Defendant now moves for summary judgment as to all plaintiffs' remaining claims pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56.1. Defendant's motion is granted.

FACTUAL BACKGROUND

In 1981, the City of McMinnville, Oregon, adopted a comprehensive plan and entered into the McMinnville Urban Growth Boundary Management Agreement ("Agreement") with Yamhill County. The Agreement was a requirement for gaining acknowledgment of McMinnville's comprehensive plan by the state of Oregon. *See* Or. Rev. Stat. § 197.175; Or. Rev. Stat. chapters 195, 196, 197. Under the Agreement, urban development cannot proceed on a parcel of land without first annexing the land to the City of McMinnville. On May 21, 1996, citizens of McMinnville passed a city charter amendment ("charter amendment") requiring that all annexations of lands to the City be approved by a majority of City voters.

Don Jones ("Jones") is the sole owner of VJ-2 Development, Inc. ("VJ-2"). Plaintiffs' property is located outside city limits but within the urban growth boundary. Prior to 1996, 29 acres of plaintiffs' property was annexed to the City and subsequently developed. The remainder of plaintiffs' property consists of two segments: an 83-acre

parcel lying north of the previously annexed land and a 96-acre parcel lying south of the previously annexed land.

In May 1995, VJ-2 submitted an annexation proposal for 17.2 acres to the McMinnville city council as part of a development proposal. According to plaintiffs, the city council denied the annexation proposal because it wanted to consider the annexation with regard to a master plan for the build-out of plaintiffs' entire property. Before VJ-2 could submit a new plan, McMinnville voters passed the charter amendment.

Between November 12, 1996, and May 16, 2000, VJ-2 submitted four proposals for annexation. Prior to each vote, Jones provided information to voters to encourage them to approve the proposal. Defendant states that the City approved and supported all of plaintiffs' annexation requests (following the 1995 proposal). Plaintiffs claim that defendant delayed and opposed some of plaintiffs' annexation requests. All four of VJ-2's annexation proposals were denied by McMinnville voters.

On June 11, 2003, plaintiffs submitted a request to the city council to extend public facilities and services outside the City's boundaries to plaintiffs' northern parcel and to modify the Agreement to allow such an extension of services. On July 8, 2003, the city council denied the request.

Plaintiffs assert five claims for relief.[1] Plaintiffs seek general declaratory, injunctive, and supplemental relief under several state statutes and injunctive relief under

[1] Though the Complaint numbers plaintiffs' claims for relief from 1 to 6, the Complaint lacks a second claim for relief.

state and federal antitrust laws. Plaintiffs assert temporary and permanent takings under the Oregon Constitution. Plaintiffs allege violations of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and of Article I, Section 20 of the Oregon Constitution. Plaintiffs also allege due process violations under the United States and Oregon Constitutions. Finally, plaintiffs allege additional civil rights violations.

DISCUSSION

Summary judgment is appropriate "if pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment, the court must draw all reasonable inferences supported by the evidence in favor of the non-moving party. *Villiarimo v. Aloha Island Air, Inc.,* 281 F.3d 1054, 1061 (9th Cir. 2002). The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).

If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts that show a genuine issue for trial. *Id.* at 324. A fact issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). The Ninth Circuit has refused to find a genuine issue where the only evidence presented is "uncorroborated and self-serving"

testimony. *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996).

Antitrust Claims

Plaintiffs' first claim for relief focuses on alleged antitrust violations. Plaintiffs allege that defendant has formed a trust, has restrained trade, and/or has monopolized trade and commerce in violation of 15 U.S.C. §§ 1 and 2 and Or. Rev. Stat. §§ 646.725 and 646.730.

Defendant argues that municipalities are immune from federal antitrust liability where, as here, their regulatory activities are a foreseeable result of the authorized implementation of state policy. *Town of Hallie v. City of Eau Claire,* 471 U.S. 34, 38-39 (1985).

Plaintiffs maintain that Oregon statutes pertaining to comprehensive planning, zoning, and annexations are all general in scope and do not specifically authorize the "displacement of unfettered business freedom." Plaintiffs maintain that defendant is not immune from liability because the state statutory scheme does not necessitate nor contemplate the anticompetitive conduct of tying public facilities and services and urban development to only annexation.

Defendant responds that the clearly expressed state policy need not expressly give a city the power to displace competition; it is enough if the state authorizes a city to displace competition with regulation or monopoly public service, and displacement of competition is a foreseeable result of that regulation.

Defendant's analysis is correct. In *Parker v. Brown,* the Supreme Court held that no federal antitrust liability

arises for an anticompetitive act by a state acting "as sovereign." 317 U.S. 341, 352 (1943). Although *Parker* immunity does not apply directly to local governments, *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 370 (1991), local governments may nonetheless qualify for *Parker* immunity where they are acting with state authority under a clearly articulated state policy to displace competition with regulation. *Town of Hallie,* 471 U.S. at 40. To qualify as "clearly articulated," the statute expressing state policy need not *explicitly* permit the displacement of competition. *City of Columbia,* 499 U.S. at 373. It is enough that the allegedly anticompetitive conduct "is the 'foreseeable result' of what the statute authorizes." *Id.* (quoting *Town of Hallie,* 471 U.S. at 42).

The Ninth Circuit has adopted a two-part test to determine whether a clearly articulated state policy has authorized a municipality's anticompetitive actions. First, a court must determine whether the legislature authorized the challenged actions of the city. Second, the court must determine whether the legislature intended to displace competition with regulation. *Trawaek v. City and County of San Francisco,* 920 F.2d 589, 591-92 (9th Cir. 1990). "A state is deemed to have intended to displace competition with regulation if the statutes pursuant to which a city has acted clearly contemplates that it may engage in anticompetitive conduct." *Id.* at 592.

In *Traweek,* the Ninth Circuit held that, because the California legislature delegated to the City of San Francisco the power to adopt a comprehensive, long-term general plan for the physical development of the city, the state contemplated the city's allegedly anticompetitive conduct, and the city enjoyed state-action immunity from antitrust claims. *Id.*

Plaintiffs argue that because the City of McMinnville has sole authority to annex property to itself, antitrust law is violated. But as defendant points out, the annexation process to a city is comprehensively regulated by statute. *See* Or. Rev. Stat. 222.111.[2] Since the City is granted authority to annex property under state statute, the State contemplated the City's allegedly anticompetitive conduct in determining whether to annex property.

Plaintiffs further allege an antitrust violation because the Agreement precludes the City and Country [sic] from providing urban services to unannexed property. However, as defendant points out, the Agreement was adopted in accordance with land-use and planning statutes. Oregon

---

[2] "(1) When a proposal containing the terms of annexation is approved in the manner provided by the charter of the annexing city . . . , the boundaries of any city may be extended by the annexation of territory that is not within a city and that is contiguous to the city . . .

"(2) A proposal for annexation of territory to a city may be initiated by the legislative body of the city, on its own motion, or by a petition to the legislative body of the city by owners of real property in the territory to be annexed.

* * *

"(5) The legislative body of the city shall submit . . . the proposal for annexation to the electors of the territory proposed for annexation and . . . the legislative body of the city shall submit such proposal to the electors of the city. . . .

* * *

"(7) Two or more proposals for annexation of territory may be voted upon simultaneously; however, in the city each proposal shall be stated separately on the ballot and voted on separately, and in the territory proposed for annexation no proposal for annexing other territory shall appear on the ballot."

Or. Rev. Stat. § 222.111.

law expressly authorizes city governments to regulate land use in coordination with counties. Or. Rev. Stat. §§ 195.015(5); 195.065; 195.070; 195.075; 197.005(5); *Seuss Builders Co. v. City of Beaverton,* 294 Or. 254, 257, n.2, 656 P.2d 306 (1982). Further, Oregon statutes require each city and country [sic] to "make land use decisions and limited land use decisions in compliance with the acknowledged plan and land use regulations." Or. Rev. Stat. § 197.175(2)(d). Once a city's comprehensive plan is acknowledged, the State requires a city to adhere to its comprehensive plan. As defendant points out, the City of McMinnville's state-acknowledged comprehensive plan states the City's policy for extension of urban services and explains the relationship between the City and Yamhill County. In acknowledging the City's comprehensive plan, the State authorized the Agreement and authorized the City to require annexation prior to the provision of urban services and to prohibit the extension of urban services to unincorporated areas.

Plaintiffs apply the wrong analysis and outdated case law to their federal antitrust claims. At oral argument on defendant's Motion for Summary Judgment, plaintiffs argued that, because defendant allegedly was not adhering to the intent and spirit of certain state land-use planning statutes, defendant could not claim *Parker* immunity. Such contentions are irrelevant. As the Ninth Circuit explained in *Trawick*:

> The legislature is deemed to have intended anti-competitive conduct as long as it may foreseeably result from a broad authority to regulate. Under this non-substantive review of the statutory scheme, the only instance in which the Court will apparently deny a finding of legislative intent to sanction the alleged anticompetitive conduct is where the state has given the municipality an

> exceedingly broad and unspecific grant of power. The Court's rejection of substantive review of state statutes is wholly consistent with the policies of federalism and state sovereignty upon which the state action doctrine is based. Once the state decides to delegate its regulatory authority to a city, that city enjoys the same immunity from federal antitrust law that the state would have enjoyed.

Traweek, 920 F.2d at 593 (citations omitted).

The court concluded:

> The legality of the 1983 Ordinance under California case law is irrelevant for the purposes of this case. The relevant question is whether the state intended the authorizing statute to have anticompetitive effects. Thus, what the city does to implement that statute, rightly or wrongly, reveals nothing about the state's intent.

Id.

In this instance, a clearly articulated state policy authorized defendant's actions. Therefore, defendant's motion for summary judgment is granted as to plaintiffs' federal antitrust claims.

Plaintiffs' state antitrust claims undergo a similar analysis, because Oregon antitrust statutes are almost identical to the federal antitrust statutes. *See* 15 U.S.C. §§ 1, 2 and Or. Rev. Stat. §§ 646.725, 646.730. Oregon courts look to federal antitrust decisions for "persuasive" guidance in interpreting the state antitrust laws. *See Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.,* 185 F.3d 957, 963 n.4 (9th Cir. 1999). As defendant points out, Or. Rev. Stat § 646.740(6) expressly provides that

the provisions of Oregon's antitrust laws "may not be construed to make illegal . . . [a]ny other activity specifically authorized under state or local ordinance." Thus, defendant is entitled to summary judgment on plaintiffs' state antitrust claims.

State Takings Claim

Plaintiffs' third claim for relief is for regulatory takings under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 18, of the Oregon Constitution. In a previous opinion and Order (issued Apr. 20, 2004) this Court dismissed plaintiffs' federal takings claim as unripe until state law remedies were pursued. *See Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 195 (1985). Thus, only plaintiffs' takings claim under Article I, section 18, is considered.

The statute of limitations for plaintiffs' state takings claim is six years. Or. Rev. Stat. 12.080(3); *Suess Builders,* 294 Or. at 257-68, 65 P.2d 306. A regulatory takings claim is not ripe "until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *McMillan v. Goleta Water Dist.,* 792 F.2d 1453, 1457 (9th Cir. 1986). Because plaintiffs' complaint was filed on December 10, 2003, defendant argues that the alleged taking must have occurred no earlier than December 10, 1997, in order for the claim to meet the statute of limitations requirements. However, voters rejected plaintiffs' annexation proposals on three occasions after December 10, 1997. It is at least arguable that the City did not reach a final decision regarding the ability of plaintiffs to

receive City facilities and services on the property in question until July 8, 2003, when the city denied plaintiffs' request to extend services. Thus, plaintiffs' state takings claim is not time-barred.

Article I, section 18, of the Oregon Constitution provides, in part, that "[p]rivate property shall not be taken for public use . . . without just compensation." An action against the government to recover the value of private property that the government has taken without first filing condemnation proceedings is an action for "inverse condemnation."[3] *Vokoun v. City of Lake Oswego,* 335 Or. 19, 26, 56 P.3d 396 (2002).

Oregon courts have recognized that a regulation may effect a taking under the Oregon Constitution if it "is a step in a plan to acquire the property for public use and denies the owner an economic use of the property pending its eventual acquisition." *Schoonover v. Klamath County,* 105 Or. App. 611, 614, 806 P.2d 156 (1991) (quoting *Dunn v. City of Redmond,* 303 Or. 201, 205, 735 P.2d 609 (1987)).[4]

---

[3] Inverse condemnation is "the popular description of a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Thornburg v. Port of Portland,* 233 Or. 178, 180 n.1, 376 P.2d 100 (1963).

[4] A party who asserts that a land use decision or regulation gives rise to a regulatory taking may choose to invoke either the authority of the Oregon Land Use Board of Appeals (LUBA) to invalidate the decision per se, or the court's authority to provide an inverse condemnation remedy. *Scappoose Sand and Gravel, Inc. v. Columbia County,* 161 Or. App. 325, 332, 984 P.2d 876 (1999).

However, Oregon courts have refused to find that a regulation effected a taking simply because the regulation deprived a property owner of the "greatest profit he might get from using or selling his property." *Clarke v. Port of Portland,* 23 Or. App. 730, 731-32, 543 P.2d 1099 (1975).

In *Gruner v. Lane County,* 96 Or. App. 694, 697-98, 773 P.2d 815 (1989), the Oregon Court of Appeals explained, "Inconvenience, reduction in profits or depreciation in the value of property that occurs as a result of a legitimate exercise of the state's police power is *damnum absque injuria* [damage without injury] and not a compensable taking." *See also Hallmark Inns & Resorts, Inc. v. City of Lake Oswego*, 193 Or. App. 24, 88 P.3d 284 (2004).

Defendant relies on *Schoonover,* 105 Or. App. 611, 806 P.2d 156, a case with similar facts, where the Oregon Court of Appeals found no inverse condemnation claim. In *Schoonover,* a landowner brought an inverse condemnation action after the county conditioned final approval of landowner's subdivision proposal to the landowner's ability to annex the tract of land into a fire district. *Id.* at 613. The landowner attempted to comply with the condition, "but compliance ultimately proved to be a difficult, if not impossible, task." *Id.* Several years later, after the landowner pursued unsuccessful attempts to either comply with the condition or have it removed, the county changed its regulation *Id.* The landowner than filed an action for inverse condemnation, claiming that the condition had effected a "temporary taking of his property." *Id.* Although the trial court found for the landowner, the Oregon Court of Appeals reversed, holding that the trial court erred in not allowing the county's motion for judgment as a matter of law.

The Court of Appeals said the county did not impose the condition as "a step in a plan to acquire the property for public use" but "merely regulated the private use of land." *Id.* at 614-15. The court wrote, "Plaintiff's case boils down to a claim that his inability to comply with the condition and the county's refusal to remove it for a period of six years precluded him from using the property for what he believed to be its highest and best use, the development of a subdivision." *Id.* at 615. The court found that the condition imposed was a "proper exercise of the police power" and "did not preclude plaintiff from use and enjoyment of property in any number of other uses consistent with its zoning." *Id.*

Plaintiffs claim that defendant "delayed and harmed" them by not annexing the property before passage of the charter amendment.[5] However, plaintiffs present no evidence that defendant's actions constituted "a step in a plan to acquire the property for public use" or that defendant denied plaintiffs any economic use of the property pending its annexation to the City. Therefore, defendant's motion for summary judgment is granted as to plaintiffs' third claim for relief.

Equal Protection Claims

Plaintiffs' fourth claim for relief alleges defendant violated plaintiffs' rights under the "equal protection" and

[5] Defendant moves to strike numerous portions of Jones's affidavit, which describes the alleged delay and harm. Defendant argues that Jones's affidavit is contradicted by Jones's prior sworn deposition testimony and that many portions of the affidavit are conclusory, irrelevant, and/or rely on hearsay. After reading Jones's affidavit, the court agrees and grants defendant's Motion to Strike.

"privileges and immunities" clauses of the United States and Oregon Constitutions. The court first considers plaintiffs' federal equal protection claim.

The statute of limitations for filing federal constitutional claims under 42 U.S.C. § 1983 is determined by the forum state's statute of limitations for personal injury actions. *Sain v. City of Bend,* 309 F.3d 1134, 1139 (9th Cir. 2002). Oregon's statute of limitations for personal injury actions is two years. Or. Rev. Stat. § 12.110(1). Plaintiffs' complaint was filed on December 10, 2003. Thus, allegations of federal civil rights violations that occurred prior to December 10, 2001, are time barred.

A federal claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action. *Bagley v. CMC Real Estate Corp.,* 923 F.2d 758, 761-62 (9th Cir. 1991); *see also DeAnza Properties X, Ltd. v. County of Santa Cruz,* 936 F.2d 1084, 1086 (9th Cir. 1991). Between November 12, 1996, and May 16, 2000, plaintiffs submitted four proposals for annexation, all of which were denied by McMinnville voters. Under *Bagley,* plaintiffs had reason to know of the alleged injuries resulting from the rejection of annexation proposals at the time voters denied their annexation proposals and at the time the city counsel [sic] denied their request to extend services. Therefore, plaintiff's federal equal protection claims arising from voters' denial of plaintiffs' annexation proposals, and the city counsel's alleged role in these denials, are time-barred.

Plaintiffs also allege federal equal protection claims arising from the city counsel's denial of plaintiffs' request to extend public facilities and services outside the City's boundaries. On June 11, 2003, plaintiffs submitted a

request to the city council to extend public facilities and services outside the City's boundaries to plaintiffs' northern parcel and modify the Agreement to allow such an extension of services. On July 8, 2003, the city council unanimously denied the request. Given that the City's denial occurred within the relevant limitations period, plaintiffs' §1983 claims based on this ground are not time-barred.

Plaintiffs maintain that the City treated them differently from others similarly situated by approving annexation or services to others. Plaintiffs argue that the City lacked a rational basis to not extend city services, primarily because it failed to follow the over-arching requirement of meeting its housing needs. Plaintiffs call themselves "a class of one," and claim they were denied equal protection under the Fourteenth Amendment to the United States Constitution.

However, a mere showing of discrimination on the part of a state government actor is not sufficient to prove an invasion of one's constitutional rights. "[A]bsent a suspect classification or invasion of fundamental rights, equal protection rights are violated only where the classification does not bear a rational relationship to a legitimate state interest." *McMillan v. Goleta Water Dist.,* 792 F.2d 1453, 1456 (9th Cir. 1986).

In *McMillan,* the Ninth Circuit held that plaintiff had not shown a genuine issue of material fact with regard to its equal protection claim, where the plaintiff did not allege the existence of a suspect classification or an invasion of a fundamental right. Nor had plaintiff set forth evidence showing that defendant Water District's motivation in applying a moratorium on new water connections

due to a water shortage was anything other than rational. *Id.*

Here, plaintiffs do not allege a suspect classification or invasion of a fundamental right. Further, defendant has put forth several rational bases for the city's decision to deny plaintiffs' request to extend public facilities and services outside the city's boundaries. As defendant explains in its Memorandum:

> The UGB Management Agreement clearly states that "[d]evelopment of urban uses on lands designated as [Future Urbanizable Land] shall be preceded by annexation of the land to the City of McMinnville." The UGB Agreement was a state requirement for gaining acknowledgment of the required comprehensive plan for the City. Since development of property at urban densities was prohibited on unincorporated land, it was illogical to extend urban services to the property. Additionally, McMinnville Water and Light does not permit the extension of water services to lands outside city limits, except to correct a health hazard situation. Moreover, the voters had spoken with regard to plaintiffs' annexation proposals and that to grant an extension of urban services contrary to the UGB Agreement would have been an end-run" around the annexation process and clear voter opinion.

Defendant's Memo. at 22 (citations to exhibits omitted).

Because plaintiffs do not allege the existence of a suspect classification or an invasion of a fundamental right, nor have plaintiffs set forth evidence showing that defendant's motivation was other than rational, defendant's summary judgment motion is granted as to plaintiffs' federal equal protection claim.

Plaintiffs also allege defendant violated their rights under Article I, section 20, of the Oregon Constitution, which reads: "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

Plaintiffs' claim under Article I, section 20, of the Oregon Constitution is also subject to a two-year statute of limitations under both Or. Rev. Stat. § 30.275(9)[6] and § 12.110(1).[7] Thus, only conduct arising from the city counsel's denial of plaintiffs' request to extend public facilities and services outside the city's boundaries is considered.

Plaintiffs assert that they were denied the same treatment as others similarly situated. "Individual inequality" occurs under Article I, section 20, when "the government has made or applied a law so as to grant or

---

[6] "Except as provided in ORS 12.120, 12.135 and 659A.875, but notwithstanding any other provision of ORS chapter 12 or other statute providing a limitation on the commencement of an action, an action arising from any act or omission of a public body or an officer, employee or agent of a public body within the scope of ORS 30.260 to 30.300 shall be commenced within two years after the alleged loss or injury."

Or. Rev. Stat. § 30.275(9).

[7] "An action for assault, battery, false imprisonment, or for any injury to the person or rights of another, not arising on contract, and not especially enumerated in this chapter, shall be commenced within two years; provided, that in an action at law based upon fraud or deceit, the limitation shall be deemed to commence only from the discovery of the fraud or deceit."

Or. Rev. Stat. § 12.110(1).

deny privileges or immunities to an individual person without legitimate reasons related to that person's individual situation." *State v. Clark,* 291 Or. 231, 239, 630 P.2d 810 (1981); *State v. Scott,* 96 Or. App. 451, 455, 773 P.2d 394 (1989).

Plaintiffs have presented no credible facts showing that defendant applied the law so as to treat plaintiffs differently from others similarly situated. Even if defendant did disfavor plaintiffs' request to extend public facilities and services outside city boundaries, defendant has put forward legitimate reasons for said treatment related to plaintiffs' individual situation. Defendant states that its comprehensive plan expressly prohibits the extension of urban services to unincorporated areas, and that it has never extended urban services out of its boundaries for the purpose of connecting unincorporated properties. Defendant contends that when the City has placed sewer lines and other infrastructure for public facilities in areas outside city limits, it has done so only to serve parcels located within the city limits. In fact, defendant points out, the City has done this to provide urban services to land that Jones has developed within city limits.

Because plaintiffs do not belong to a suspect class, the court must apply a rational basis analysis to plaintiffs' Article 1, section 20, claim. *Jensen v. Whitlow,* 334 Or. 412, 423, 51 P.3d 599 (2002); *In re Marriage of Crocker,* 332 Or. 42, 55, 22 P.3d 759 (2001). Because defendant asserts legitimate bases for its actions, defendant is entitled to summary judgment as to this claim.

Due Process Claims

Plaintiffs' fifth claim for relief is for violation of due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 9, and Article IV, section 2, of the Oregon Constitution. Plaintiff's federal and state due process claims arising from voters' denial of plaintiffs' annexation proposals, and the city counsel's alleged role in these denials, are time-barred, as discussed above.

In terms of defendant's refusal to extend facilities and services to plaintiffs' unannexed property, plaintiffs have provided no legal or factual basis for their substantive due process claim. Furthermore, the conduct on which plaintiffs' base their substantive due process claim is the same conduct on which they based their claims for violations of equal protection. Plaintiffs are precluded from asserting a substantive due process claim instead of, or in addition to, a more specific constitutional provision based on the same set of facts. *Buckles v. King County,* 191 F.3d 1127, 1137-38 (9th Cir. 1999).

Neither have plaintiffs provided any legal or factual basis for any procedural due process claim; plaintiff does not allege that defendant failed to provide them with notice or an opportunity to be heard. Finally, plaintiffs' Ex Post Facto claim fails because there is no penal law at issue in this case. *See Brown v. Palmateer,* 379 F.3d 1089, 1093 (9th Cir. 2004).

Plaintiffs' Remaining Claims

Plaintiffs' sixth claim neither makes new arguments nor offers additional legal bases for relief. Plaintiffs also raise a number of state law claims but, as defendant

points out, they failed to use the proper procedures available to pursue state law remedies. Under Oregon law, plaintiffs should have raised any objections to land use decisions by the City with the Land Use Board of Appeals (LUBA) or, alternatively, by requesting a Writ of Review. LUBA holds exclusive jurisdiction to review any land use decision or limited land use decision of a local government. Or. Rev. Stat. § 197.825.

Therefore, summary judgment is granted in favor of defendant on plaintiffs' sixth claim for relief.

CONCLUSION

Defendant's Motion for Summary Judgment (doc. 32) and Motion to Strike (doc. 48) are GRANTED, and this case is DISMISSED.

IT IS SO ORDERED.

Dated this 25 day of April 2005.

/s/ Ann Aiken
Ann Aiken
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DON JONES and VJ-2 DEVELOPMENT, INC., an Oregon corporation, Plaintiffs,	)	Civ No. 04-0047-AA
vs.	)	OPINION AND ORDER
CITY OF MCMINNVILLE, an Oregon municipal corporation, Defendant.	)	

John W. Shonkwiler
13425 S.W. 72nd Avenue
Tigard, OR 97223
Attorney for plaintiff

James P. Martin
Kari Z. Furnanz
Hoffman, Hart, & Wagner
Twentieth Floor
1000 S.W. Broadway
Portland, Oregon 97205
Attorneys for defendants

AIKEN, Judge:

Plaintiffs originally filed this action in the Circuit Court for the State of Oregon for the County of Yamhill. Pursuant to 28 U.S.C. §§ 1441 and 1446, defendant removed the case to the United States District Court for the District of Oregon. Plaintiffs now move this court pursuant to 28 U.S.C. § 1447(c) for an order remanding this proceeding to state court. Plaintiffs' motion is denied.

A civil action filed in state court may be removed to federal court if the claim is "arising under" federal law. 28 U.S.C. § 1441. The right to remove is "to be determined according to the plaintiffs' pleading at the time of the petition for removal." *Pullman Co. v. Jenkins,* 305 U.S. 534, 537-38 (1939). Whether a claim arises under federal law within the meaning of 28 U.S.C. § 1331 depends upon the well-pleaded allegations of the complaint: "a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution." *Beneficial Nat'l Bank v. Anderson,* 123 S. Ct. 2058, 2062 (2003) (quoting *Louisville & Nashville R.R. Co. v. Mottley,* 211 U.S. 149, 152 (1908)). I find that defendants have met the requirements for removal under §§ 1441 and 1446.

Here, plaintiffs allege four claims for alleged violations of their rights under the Fifth and Fourteenth Amendments to the United States Constitution, and one claim alleging a violation of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1 and 2, all clearly arising under federal law. *See* Complaint, pp. 8-15. Nevertheless, plaintiffs move for remand – and seek attorney fees – on the ground that their federal takings claims asserted under the Fifth and Fourteenth Amendments to the United States Constitution are not "ripe," and therefore do not constitute a case in controversy to allow federal subject matter jurisdiction.

Plaintiffs contend that they fail to meet the ripeness requirements imposed on regulatory taking cases by *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 186 (1985). The *Williamson County* ripeness analysis is a two-step inquiry; the plaintiff must have obtained a final decision from the governmental

authority charged with implementing the regulations and must have pursued compensation through state remedies unless doing so would be futile. *Id.* at 186.

The "final decision" element is satisfied when the property owner receives a "final and definitive decision from a land use regulatory body on development of the property at issue." *Dodd v. Hood River County,* 59 F.3d 852, 858 (9th Cir. 2000). In *Dodd,* for example, the final decision requirement for determining the ripeness of a takings challenge to land development regulations was met when landowners filed and were denied land use and conditional use permits and petitions for zoning and comprehensive plan changes. *Id.* In the instant case, plaintiffs allege that they have received several decisions that limited the development of their property. In May of 1998, November of 1999, and May of 2000, the citizens of McMinnville denied annexation of plaintiff's property to McMinnville after plaintiffs applied for annexation. Complaint pp. 4-5. Plaintiffs also allege that in a July, 2003 city council meeting, the City of McMinnville denied plaintiffs' request to extend public facilities and services to plaintiffs' property, prohibiting urban development by refusing to annex plaintiff's property. Complaint p. 6.

Nonetheless, plaintiffs concede that they have not fulfilled the second requirement, which requires the denial of "just compensation" by the state. *Williamson County,* 473 U.S. at 194 n.13. Plaintiffs thus seek remand of this action to state court in order to seek compensation and also request costs and attorney's fees incurred in bringing this motion. I find curious plaintiffs' request for fees; plaintiffs included federal question claims in their state court complaint, and plaintiffs failed to affirmatively plead that their federal claims were not yet ripe. Defendant was

not obligated to sit on its rights and forego removal based on the speculative notion that plaintiffs would challenge removal on such grounds. Regardless, the court considers whether remand is appropriate.

The Ninth Circuit has determined that a plaintiff need not pursue a Fifth Amendment action in state court in order to ripen the federal constitutional claims based on an alleged taking. *Dodd,* 59 F.3d at 859. Rather, the compensation element is satisfied if remedies under state substantive law are pursued. *Id.* at 860-61. Here, plaintiffs are pursuing state law remedies through the inverse condemnation claim asserted in their complaint.

Plaintiffs argue that this court should model its decision on an order in *Dolan v. City of Beaverton,* Civ. No. 95-96-JO (D. Or. June 6, 1995), where the court remanded a similar case to state court based in part on ripeness grounds. Plaintiffs' Exhibit A. This court declines to do so. The *Dolan* order stated that the plaintiffs failed both ripeness prongs of *Williamson County,* rather than just the compensation issue. In this case, plaintiffs-argue only that the compensation issue is not yet decided. The resolution of this issue requires the application of state substantive law to plaintiffs' state law claims for inverse condemnation, which this court is competent to apply pursuant to 28 U.S.C. § 1367(a) (allowing supplemental jurisdiction).

Even if remand were appropriate on this ground, plaintiffs' takings and § 1983 claims remain unripe, according to plaintiffs' own motion. If and when the compensation determination is made, plaintiffs' federal claims could mature. However, because plaintiffs presently concede that their federal takings claim is unripe due to lack of a compensation determination, this claim is dismissed without

prejudice. *See Macri v. King County,* 126 F.3d 1125, 1129 (9th Cir. 1997) (proper to dismiss as unripe federal takings claims when compensation issue awaits determination).

Finally, even though plaintiffs' takings claim is dismissed, there remain a federal anti-trust claim under the Sherman Act and federal equal protection and due process claims that arguably are not contingent upon plaintiffs' federal takings claim. Accordingly, pursuant to 28 U.S.C. § 1441(c) and 28 U.S.C. § 1367(a), this court retains jurisdiction over plaintiffs' state law claims. If, during the course of these proceedings, plaintiffs' federal takings claim ripens, plaintiff may petition the court to amend the complaint.

CONCLUSION

Plaintiffs' Motion to Remand and request for fees (doc. 4) is DENIED. Plaintiffs' federal taking claim asserted pursuant to the Fifth Amendment is hereby DISMISSED WITHOUT PREJUDICE.

IT IS SO ORDERED.

Dated this 20 day of April, 2004.

/s/ Ann Aiken
Ann Aiken
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DON JONES; et al., Plaintiffs-Appellants, V. CITY OF MCMINNVILLE, OREGON, an Oregon municipal corporation, Defendant-Appellee.	No. 05-35523 D.C. No. CV-04-00047-ALA **JUDGMENT**

Appeal from the United States District Court for the District of Oregon (Eugene).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon (Eugene) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered 05/09/07

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DON JONES and
VJ-2 DEVELOPMENT, INC.,
an Oregon corporation,

Plaintiff,

v.

Civil No. 04-47-AA

CITY OF MCMINNVILLE,
an Oregon municipal corporation,

Defendant.

JUDGMENT

(Filed Apr. 27, 2005)

This action is dismissed.

Dated: April 27, 2005.

Donald M. Cinnamond, Clerk

by /s/ C. Pew
C. Pew, Deputy

APPENDIX F

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

When prosecution to be by presentment or indictment double jeopardy; self-incrimination; due process, compensation for property taken for public use. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. [Proposed by Congress in 1789 and ratified by the necessary number of states in 1791]

AMENDMENT XIV

Section 1. Citizenship; privileges and immunities; due process; equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF OREGON

ARTICLE I
BILL OF RIGHTS

Section 10. Administration of justice. No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation. –

* * *

Section 18. Private property or services taken for public use. Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered; provided, that the use of all roads, ways and waterways necessary to promote the transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use. [Constitution of 1859; Amendment proposed by S.J.R. 17, 1919, and adopted by the people May 21, 1920; Amendment proposed by S.J.R. 8, 1923, and adopted by the people Nov. 4, 1924]

* * *

Section 20. Equality of privileges and immunities of citizens. No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens. –

APPENDIX G

OREGON REVISED STATUTES

12.080 (3) An action for waste or trespass upon or for interference with or injury to any interest of another in real property, excepting those mentioned in ORS 12.050, 12.060, 12.135, 12.137 and 273.241; or

---

12.110 (1) An action for assault, battery, false imprisonment, or for any injury to the person or rights of another, not arising on contract, and not especially enumerated in this chapter, shall be commenced within two year; provided, that in an action at law based upon fraud or deceit, the limitation shall be deemed to commence only from the discovery of the fraud or deceit.

197.015 (10) "Land use decision":

(a) Includes:

(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

(i) The goals;

(ii) A comprehensive plan provision;

(iii) A land use regulation; or

(iv) A new land use regulation;

(B) A final decision or determination of a state agency other than the commission with

respect to which the agency is required to apply the goals; or

(C) A decision of a county planning commission made under ORS 433.763;

(b) Does not include a decision of a local government:

(A) Which is made under land use standards which do not require interpretation or the exercise of policy or legal judgment;

(B) Which approves or denies a building permit issued under clear and objective land use standards;

(C) Which is a limited land use decision;

(D) Which determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility which is otherwise authorized by and consistent with the comprehensive plan and land use regulations; or

(E) Which is an expedited land division as described in ORS 197.360;

(c) Does not include a decision by a school district to close a school;

(d) Does not include authorization of an outdoor mass gathering as defined in ORS 433.735, or other gathering of fewer than 3,000 persons that is not anticipated to continue for more than 120 hours in any three-month period; and

(e) Does not include:

(A) A writ of mandamus issued by a circuit court in accordance with ORS 215.429 or 227.179; or

(B) Any local decision or action taken on an application subject to ORS 215.427 or 227.178 after a petition for a writ of mandamus has been filed under ORS 215.429 or 227.179.

197.307 (3)(a) When a need has been shown for housing within an urban growth for boundary at particular price ranges and rent levels, needed housing, including housing for farmworkers, shall be permitted in one or more zoning districts or in zones described by some comprehensive plans as overlay zones with sufficient buildable land to satisfy that need.

(b) A local government shall attach only clear and objective approval standards or special conditions regulating, in whole or in part, appearance or aesthetics to an application for development of needed housing or to a permit, as defined in ORS 215.402 or 227.160, for residential development. The standards or conditions may not be attached in a manner that will deny the application or reduce the proposed housing density provided the proposed density is otherwise allowed in the zone.

(6) Any approval standards, special conditions and the procedures for approval adopted by a local government shall be clear and objective and may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.

197.522 A local government shall approve an application for a permit, authorization or other approval necessary for the subdivision or partitioning of, or construction on, any land that is consistent with the comprehensive plan and applicable land use regulations or shall impose reasonable conditions on the application to make the proposed activity consistent with the plan and applicable regulations. A local government may deny an application that is inconsistent with the comprehensive plan and applicable land use regulations and that cannot be made consistent through the imposition of reasonable conditions of approval. [1999 c.838 §4]

197.752 (1) Lands within urban growth boundaries shall be available for urban development concurrent with the provision of key urban facilities and services in accordance with locally adopted development standards.

227.173 (1) Approval or denial of a discretionary permit application shall be based on standards and criteria, which shall be set forth in the development ordinance and which shall relate approval or denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the area in which the development would occur and to the development ordinance and comprehensive plan for the city as a whole.

(2) When an ordinance establishing approval standards is required under ORS 197.307 to provide only clear and objective

standards, the standards must be clear and objective on the face of the ordinance.

(3) Approval or denial of a permit application or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth.

(4) Written notice of the approval or denial shall be given to all parties to the proceeding. [1977 c.654 §5; 1979 c.772 §10b; 1991 c.817 §16; 1995 c.595 §29; 1997 c.844 §6; 1999 c.357 §3]

APPENDIX H

McMINNVILLE COMPREHENSIVE PLAN

GOAL V 2: TO PROMOTE A RESIDENTIAL DEVELOPMENT PATTERN THAT IS LAND-INTENSIVE AND ENERGY-EFFICIENT, THAT PROVIDES FOR AN URBAN LEVEL OF PUBLIC AND PRIVATE SERVICES, AND THAT ALLOWS UNIQUE AND INNOVATIVE DEVELOPMENT TECHNIQUES TO BE EMPLOYED IN RESIDENTIAL DESIGNS.

Policies:

71.00 The City shall designate specific lands inside the urban growth boundary as residential to meet future projected housing needs. Lands so designated may be developed for a variety of housing types. All residential zoning classifications shall be allowed in areas designated as residential on the Comprehensive Plan Map.

71.05 The City of McMinnville shall encourage annexation and rezonings which are consistent with the policies of the comprehensive plan so as to achieve a continuous five-year supply of buildable land planned and zoned for all needed housing types. (as amended by Ord. No. 4243, Apr. 5, 1983)

CITY OF MCMINNVILLE ORDINANCES

13.04.080 Private wastewater disposal. A. Where a public sanitary sewer is not available under the provisions

of Section 13.04.070(D) the building sewer shall be connected to a private sewage disposal system complying with the provisions of this section.

APPENDIX I

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF YAMHILL

DON JONES and VJ-2 DEVELOPMENT, INC., an Oregon corporation, Plaintiffs, vs. CITY OF MCMINNVILLE, an Oregon municipal corporation, Defendant	No. CV 030428 COMPLAINT (Declaratory, Injunctive and Supplemental Relief, Antitrust, Inverse Condemnation, Due Process, Equal Protection, and Civil Rights) DEMAND FOR JURY TRIAL

Plaintiffs allege:

GENERAL ALLEGATIONS

1.

At all material times, Plaintiff Don Jones is and was a resident of Oregon and possessed an ownership interest in Plaintiff VJ-2, Development, Inc., and certain parcels of real property consisting of approximately 219 acres located west of the City of McMinnville, described starting in 1994 as Tax Lots 100, 105, 200, 202 and 300, Map R.4W., T.4 S. (the "Property"), as more fully described in Exhibit "A" incorporated herein by reference. Plaintiff VJ-2 Development, Inc., is an Oregon corporation doing business as a residential and commercial development company and possesses an ownership interest in the Property.

2.

At all material times, the City of McMinnville ("Defendant") was and is an existing, duly incorporated and organized municipal corporation under the laws of the State of Oregon. Defendant was and is vested with the statutory authority to condemn real property or any part thereof and to regulate land uses, public facilities and services in order to carry out a public purpose otherwise authorized by statute.

3.

At all material times, the Property consists of vacant parcels of land located adjacent to and outside the boundaries of the City of McMinnville. The Property is located wholly within the Defendant's adopted Urban Growth Boundary. The Property is zoned as Exclusive Farm Use 40-acre minimum (EFU-40) under Yamhill County ("County") land use regulations. It is designated as "Future Urbanizable" in accordance with the "McMinnville Urban Growth Boundary Management Agreement" ("UGB Agreement"), entered into by the Defendant and the County. The Defendant has identified that the Property is needed for residential urbanization by the year 2000 to meet the requirements of the LCDC acknowledged Comprehensive Plan for Defendant. The UGB Agreement requires that the Property must first be annexed by Defendant before the Property can be designated and developed for residential urbanization.

4.

A. Prior to Plaintiffs acquiring the Property, the Defendant included the Property within its Urban Growth

Boundary and extended water and sewer lines out to the property specifically designed to accommodate future urban development of the Property.

B. In 1994, Plaintiffs conferred with Defendant's planning officials and other officials and Plaintiffs were informed that adequate public facilities and services were available to allow full urbanized development of the Property, that the Property was ready for immediate annexation and development, and based upon this information the Plaintiffs completed a contract to purchase the Property. Thereafter, Plaintiffs presented preliminary plans for development of the Property and proposed an annexation request to the Defendant. Plaintiffs also met with the general public concerning its proposed annexation and development plans. Subsequently, citizens of and near the Defendant obtained the Defendant's support to adopt a City Charter Amendment to prevent annexations without an approval vote of the Defendant's citizens. Prior to passage of the Defendant's Charter amendment to allow a citizen vote on annexations, Defendant wrongfully induced Plaintiffs into delaying filing Plaintiffs' annexation application to the Defendant.

C. On May 21, 1996, with the Defendant's support, the citizens of Defendant passed a City Charter amendment which requires that all annexations of lands to the Defendant must be voted upon by a majority of voters of the Defendant before the annexation request can become valid. The Defendant adopted the charter amendment by ordinance on November 12, 1996.

D. Plaintiffs desiring to annex and develop the Property, applied to the Defendant for annexation and obtained approval from the Defendant for annexation and

development of the Plaintiffs' Property, subject to subsequent approval of the voters under the charter amendment. On or about November 4, 1997, the citizens of Defendant voted to deny the annexation.

E. Plaintiffs again applied to the Defendant for annexation and obtained approval from the Defendant for annexation and development of the Plaintiffs' Property, subject to subsequent approval of the voters under the charter amendment. On or about May 19, 1998, the citizens of Defendant again voted to deny the annexation.

F. Plaintiffs again applied to the Defendant for annexation and obtained approval from the Defendant for annexation and development of the Plaintiffs' Property, subject to subsequent approval of the voters under the charter amendment. On or about November of 1999, the citizens of Defendant again voted to deny the annexation.

G. Plaintiffs again applied to the Defendant for annexation and obtained approval from the Defendant for annexation and development of the Plaintiffs' Property, subject to subsequent approval of the voters under the charter amendment. On or about May 16, 2000, the citizens of Defendant again voted to deny the annexation.

5.

A. Defendant's Comprehensive Plan Policy 71.00 requires:

> "The City shall designate specific lands inside the urban growth boundary as residential to meet future projected housing needs. Lands so designated may be developed for a variety of housing types. All residential zoning classifications shall be allowed

> in areas designated as residential on the Comprehensive Plan Map."

At all material time, the Plaintiffs' Property, located within the urban growth boundary, was designated as residential to meet the Defendant's housing needs.

B. Defendant's Comprehensive Plan Policy 71.00 requires:

> "The City shall plan for development of the property located on the west side of the City to be limited to a density of six units per acre. It is recognized that it is an objective of the City to disperse multi-family units throughout the community. In order to provide for multi-family units on the west side, sewer density allowances or trade-offs shall be allowed and encouraged."

At all material time, Plaintiffs' Property is located on the west side of the City and Plaintiffs have proposed development of their property at 6 units per acre with a variety of housing types that include multi-family units.

C. Defendant's Comprehensive Plan Policy 71.05 requires:

> "The City of McMinnville shall encourage annexation and rezonings which are consistent with the policies of the comprehensive plan so as to achieve a continuous 5-year supply of buildable land planned and zoned for all needed housing types."

Prior to Plaintiffs purchasing the Property and submitting each annexation and development application, the Plaintiffs relied upon the encouragement and assurances of the Defendant that the Property would be brought into the Defendant for development at urban densities. At all

material time, the Property was not annexed and/or developed, directly leading to the Defendant's failure to achieve a continuous 5-year supply of buildable land planned and zoned for all needed housing types.

D. Defendant's Comprehensive Plan Policy 139.00 requires:

> "The City of McMinnville shall extend or allow extension of sanitary sewage collection lines within the framework outlined below:
>
> 1. Sufficient municipal treatment plant capacities exist to handle maximum flows of effluents.
> 2. Sufficient trunk and main line capacities remain to serve undeveloped land within the projected service areas of those lines.
> 3. Public water service is extended and planned for expansion to serve the area at the proposed development densities by such time that sanitary sewer services are to be utilized.
> 4. Extensions will implement applicable goals and policies of the comprehensive plan."

At all material time, the Plaintiffs' Property satisfied all the requirements of the Defendant's Comprehensive Plan Policy 139.00 for extension of the Defendant's public facilities and services to Plaintiffs' Property.

E. On or about June 11, 2003, Plaintiffs applied to Defendant for authorization to extend the Defendant's public facilities and services (outside the Defendant's boundaries) to the Property and to modify the UGB Agreement (to allow extraterritorial extension of public facilities/ services and land use approvals of the Property

at urban densities). On July 8, 2003, at a regularly conducted Defendant Council meeting, the Defendant refused Plaintiffs' request for extension of Defendant's public facilities and services to the Property, and refused to allow urban development of the Property while it remained outside the Defendant's boundaries.

6.

A. Defendant, by and through the authority of its citizens under the Defendant's Charter, have carried out a pattern and practice of having acted in bad faith, vexatiously, wantonly, for oppressive reasons or with reckless disregard, and all in violation of societal norms, in injuring and interfering with the Plaintiffs' rights to due process, their other constitutionally protected rights, and deprived Plaintiff of its ability to use the property for an economic use without the Defendant having a compelling governmental interest to prevent or restrict such use.

B. At all material time herein, Defendant has failed to comply with Defendant's Comprehensive Plan Policies 71.00, 71.05 and 139.00, and ORS 215.402, ORS 197.307, ORS 646.725 and ORS 646.730.

C. Defendant's conduct has continued to interfere with plaintiffs' rights and the use and enjoyment of Plaintiffs' property continuously until the date of trial.

7.

A. Defendant's actions have irreversibly and directly or proximately caused damage or loss to Plaintiffs in economic damages in the approximate sum of $38,670,600. The exact amount to be determined at trial.

B. For permanent deprivation of said property, Plaintiffs shall irreversibly incur loss of fair market value for the land in the approximate sum of $13,311,400. The exact amount to be determined at trial.

C. Defendant has intentionally and continuously failed to take actions that would have mitigated or otherwise reduced Plaintiffs' damages.

D. Plaintiffs are entitled to recover their reasonable attorney's fees and costs incurred as a result of said injuries.

E. Plaintiff provided Defendant with notice of its claims pursuant to and in full compliance with ORS 30.275 (3) (b) for actual and formal notice on October 10, 2003.

FIRST CLAIM FOR RELIEF

(Declaratory, Injunctive and Supplemental Relief)

8.

A. This is a proceeding for Declaratory and Injunctive Relief under ORS Chapter 28 for the purpose of determining a question of actual controversy between the parties hereto.

B. The UGB Agreement, in pertinent part, precludes the County from providing urban public facilities and services to the Property and further precludes the County from approving urban land uses for the Property. The County and Defendant are separate proprietors and authorities of public facilities and services, and they have agreed to allow the Defendant to have an absolute monopoly of all such

urban public facilities and services within the Defendant's Urban Growth Area.

C. On or about June 11, 2003, Plaintiffs filed an application for approval from Defendant for the extraterritorial extension of public facilities and services to, as well as authority to approve urban land uses for, the Property; and such request was denied by the Defendant on July 8, 2003, at the regularly conducted meeting of Defendant's Council.

D. With the exception of annexing the Property to Defendant, Plaintiffs have complied with all requirements of the Defendant, County and State for public urban facilities and services connection to the Property. Plaintiffs have no adequate legal or administrative remedy available.

E. A justiciable controversy exists between Plaintiffs and Defendant with respect to Defendant's actions and interpretations of said services agreement between the Defendant and the County as it relates to the Plaintiffs' Property.

9.

(Violation of Antitrust Laws)

A justiciable controversy exists between Plaintiffs and Defendant with respect to Defendant's actions and interpretations of said services agreement between the Defendant and the County as it relates to the Plaintiffs' Property in that Defendant has contracted, combined in the form of a trust or otherwise, or combined in restraint of trade or commerce in violation of ORS 646.725; and has monopolized, or attempted to monopolize, or combined or conspire with any other person or persons, to monopolize a part of the trade or commerce in violation of ORS 646.730, and Section 1 and 2 of the Sherman Act (15 USC Section 1 and 2).

10.

(Violation of Constitutional Provisions)

A justiciable controversy exists between Plaintiffs and Defendant with respect to Defendant's actions and interpretations of said services agreement between the Defendant and the County as it relates to the Plaintiffs' Property in that said conduct of the Defendant has deprived Plaintiffs of due process of law, equal protection of the laws, impaired the obligation of contracts and passed a bill of attainder and ex post facto law, and privileges immunities secured by Article I, Sections 1, 8, 10, 18, 20, 21 and 26 of the Oregon Constitution, and Article I, Section 1, Article IV, Section 2, Fifth and Fourteenth Amendments of the United States Constitution.

11.

(Invalidation of City Charter
citizen vote on annexations)

A justiciable controversy exists between Plaintiffs and Defendant with respect to Defendant's actions in denying Plaintiffs' annexation requests through citizen voting on annexations and refusal to extend public facilities and services to serve Plaintiffs' property, thereby causing the Defendant to: (1) fail to meet provision of adequate housing required by ORS Chapter 197; (2) fail to make land use decisions for housing with clear and objective standards pursuant to ORS 215.402 and ORS 197.307(3)(b); (3) violate ORS 646.725, ORS 646.730, and Sections 1 and 2 of the Sherman Act (15 USC Section 1 and 2) by Defendant's refusal to provide such services to Plaintiffs property; (4) preclude Plaintiffs' annexations and extension of public facilities and services in a manner in which Defendant

treated Plaintiffs differently than it treated other similarly situated properties in violation of the Fifth and Fourteenth Amendment of the U.S. Constitution and Article I, Section 10 and 20 of the Oregon Constitution; (5) achieve indirectly, under color of state law, what it cannot achieve directly by making the peaceful enjoyment of Plaintiff's property rights contingent upon the uncontrolled will of all the voters, which constitutes an unconstitutional restraint upon Plaintiffs' enjoyment of those rights in violation of the Due Process Clause of the Fifth Amendment of the U.S. Constitution; and (6) abridging the privileges and immunities guaranteed by Article IV, Section 2 and the 14th Amendment of the U.S. Constitution, and Article I, Section 20 of the Oregon Constitution, by failing to grant to Plaintiffs, or to a class of citizens including Plaintiffs, upon the same terms, equally with other citizens within Defendant and equally with other citizens in other municipalities not subject to a municipal charter amendment requiring citizen voter approval of annexations.

IN THE ALTERNATIVE and in the event the Court does not grant Plaintiffs' request for declaratory, injunctive and supplemental relief herein, and in addition to the First Claim for Relief; Plaintiffs allege:

SECOND CLAIM FOR RELIEF

(Antitrust)

12.

Plaintiffs reallege Paragraphs 1 through 11 of the Complaint.

13.

Defendant is not regulated by the Oregon Public Utilities Commission regarding the decision to: (1) provide public facilities and services (sanitary sewer, water and storm sewer) to Plaintiffs' Property; (2) annex the property by Defendant; and (3) adopt said services agreement between Defendant and the County.

14.

Pursuant to the UGB Agreement, the Defendant's public facilities and services (sanitary sewer, water and storm sewer) are the only available facilities that are located in proximity to service the Property.

15.

The UGB Agreement gave or purported to give Defendant: (1) an exclusive right to annex the property; (2) tie the provision of sanitary sewer services, water and other urban public facilities and services to the annexation of the Property; and (3) require the County to refuse all applications for extension of urban public facilities and services by Plaintiffs and urban land use applications where Plaintiffs had not previously annexed to Defendant. The UGB Agreement between the Defendant and the County divided territories for the provision and administration of public facilities between them, and established the Defendant as having exclusive provider territories to the exclusion of all other potential providers of a similar nature.

16.

The UGB Agreement, by its terms, is automatically renewable unless either the City or the County requests revision of the agreement. Plaintiffs have requested that the services agreement be revised or modified to provide urban services and urban uses to Plaintiffs' Property, and that request was rejected.

17.

On or about June 11, 2003, Plaintiffs attempted to make specific application for provision of urban public facilities and services, and approval of urban land uses, to the Property. On or about July 8, 2003 at a regularly conducted Defendant Council meeting, Defendant, for the purpose of accomplishing the conspiracy and perpetuating its monopoly refused to process said application, and refused to provide Plaintiffs with any method of obtaining urban facilities and services until Plaintiffs' Property is first annexed to Defendant.

18.

On July 8, 2003, Defendant, while aware that Plaintiffs were willing, ready and able to develop the Property, formed the desire and intent to preclude competition from other governmental entities or private services providers to provide urban public facilities and services to the Property, and to gain an illegal and unfair advantage, and conspire with the County to prevent Plaintiffs from the exercise of its lawful business of developing the Property.

19.

Defendant's actions and the resulting interference with Plaintiffs' development of the Property has caused, and will continue to cause, substantial and irrevocable injury. At all material time, Defendant has known of Plaintiffs' development intentions, and have also known of Plaintiffs' significant efforts and expenditures toward that goal.

20.

Defendant has contracted, combined in the form of a trust or otherwise, or conspired in restraint of trade or commerce, or combined to unreasonably restrain trade or commerce, in violation of ORS 646.725. Said actions of the Defendant further constitutes a group boycott or concerted refusal to deal, an unlawful tying arrangement of relating provision of urban public facilities and services to annexation to Defendant, and an unlawful horizontal territorial division of the market between Defendant and the County, thereby constituting a *per se* violation of ORS 646.725. Correspondingly, said actions of the Defendant violate Section 1 and Section 2 of the Sherman Act (15 U.S.C. Section 1 and Section 2).

21.

As a direct and/or proximate result of Defendant's actions, Plaintiffs have been damaged in an amount to be determined at trial.

THIRD CLAIM FOR RELIEF

(Inverse Condemnation)

22.

Plaintiffs reallege Paragraphs 1 through 21 of the Complaint.

COUNT ONE
(Temporary "Taking")

23.

Defendant has substantially interfered with Plaintiffs' use and enjoyment of their property and further frustrated Plaintiffs' attempts to develop their property for urban uses in accordance with their reasonable, investment-backed expectations, and deprived them of their property since November 4, 1997, deprived them of all economic use of the Property, without due process and just compensation in violation of the Fifth and Fourteenth amendments of the U.S. Constitution and Article I, Section 18 of the Oregon Constitution. Such violations and resulting damages are continuing until the unconstitutional exactions are terminated.

COUNT TWO

(Permanent "Taking")

24.

Defendant has substantially interfered with Plaintiffs' use and enjoyment of their property, and further frustrated Plaintiffs' attempts to develop their property for urban use in accordance with their reasonable, investment-backed expectations, deprived them of all economic use of the Property, and deprived them of such use by a

permanent taking of their property without due process and just compensation in violation of the Fifth and Fourteenth amendments of the U.S. Constitution and Article I, Section 18 of the Oregon Constitution upon the determination or election by Defendant to continuously require or impose the challenged exactions to the Property.

FOURTH CLAM FOR RELIEF
(Equal Protection)

25.

Plaintiffs reallege Paragraphs 1 through 24 of the Complaint.

26.

A. Defendant's intentionally entered into a services agreement with the County which required annexation prior to any extension of services to Plaintiffs' Property and restricted future development and uses of the property to future urbanizable uses. Defendant intentionally prevented Plaintiffs' Property from being annexed to Defendant and thereby precluded development of the property for any economic uses.

B. At all material time, Defendant approved annexation and development of property similarly situated while precluding Plaintiffs' Property, and as such, placed a greater and disproportioned burden upon the Plaintiffs and their property.

C. Defendant intentionally treated Plaintiffs differently from others similarly situated, allowed Plaintiffs' competitors to annex, allowed extension of public facilities and services to such parcels, and develop such parcels

within the same urban growth boundary lands that Plaintiffs attempted to acquire and develop, thereby resulting in Plaintiffs being denied their market share; and there is no rational basis for the Defendant's difference in treatment.

27.

Defendant's actions have abridged the privileges and immunities of the Plaintiffs allowed other citizens under the laws of the State of Oregon and the United States, and denied Plaintiffs the equal protection of the laws, in violation of Article IV, Section 2 and the Fourteenth Amendment of the U.S. Constitution; and Article I, Section 20, of the Oregon Constitution.

FIFTH CLAIM FOR RELIEF

(Due Process)

28.

Plaintiffs reallege Paragraphs 1 through 27 of the Complaint.

29.

A. Defendant's actions have caused, and were intended to cause or were done with such reckless disregard as to deprive Plaintiffs of their right to due process of law as applied through the Fourteenth Amendment of the U.S. Constitution; and thereby deprived Plaintiffs of due process in violation of the Article I, Section 9, Article IV, Section 2, Fifth and Fourteenth Amendments of the U.S. Constitution; and Article I, Sections 8, 10, 20, 21 and 26 of the Oregon Constitution.

B. Defendant's actions were not authorized by the Defendant's applicable comprehensive plan or code provisions and were not authorized by any compelling governmental interest or legitimate public purpose. Therefore, Defendant's decision to impose the said restrictions upon Plaintiffs' Property was unreasonable, arbitrary and capricious.

SIXTH CLAIM FOR RELIEF

(Civil Rights)

30.

Plaintiffs reallege Paragraphs 1 through 29 of the Complaint.

31.

Defendant acted under color of state law, statute, ordinance, regulation, custom and usage of the State of Oregon and its political subdivisions and thereby subjected and abridged Plaintiffs' rights and privileges to the use and enjoyment of their Property, caused Plaintiffs to be deprived of property without just compensation and without due process of law; and denied Plaintiffs the equal protection of the laws and due process, in violation of 42 USC Section 1983. Plaintiffs are entitled to their reasonable attorney's fees under 42 USC Section 1988.

WHEREFORE, Plaintiffs pray for a judgment against Defendant as follows:

1. For the First Claim for Relief:

A. Declaration that a declaratory judgment be rendered and entered declaring and adjudicating the respective rights and duties of the Plaintiffs and

Defendant in and relative to the said interferences with Plaintiffs' property and rights;

B. Further declaring that the Plaintiff is entitled to extension of urban services to their property, and amendment of the urban growth boundary agreement between the Defendant and the County to allow urban development of the Plaintiffs' property; and

C. Enjoining the Defendant from precluding extension of urban services and approval of urban land uses to plaintiffs' property.

2. For the Second Claim for Relief: injunctive relief, costs and disbursements, and reasonable attorney fees;

3. For the Third Claim for Relief: economic damages in the sum of: Count One – $7,986,840; Count Two – $13,311,400;

4. For the Fourth through Sixth Claims for Relief: economic damages in the sum of $38,670,600;

5. For all claims for relief: reasonable attorney's fees, costs and disbursements incurred herein; and for such other relief as the Court may deem just and proper.

JEFFREY S. SEYMOUR

/s/ J. S. Seymour
Jeffrey S. Seymour, OSB 79388
Of Attorneys for Plaintiffs

JOHN W. SHONKWILER, P.C.

/s/ John W. Shonkwiler
John W. Shonkwiler, OSB 75337
Of Attorneys for Plaintiffs
Trial Counsel

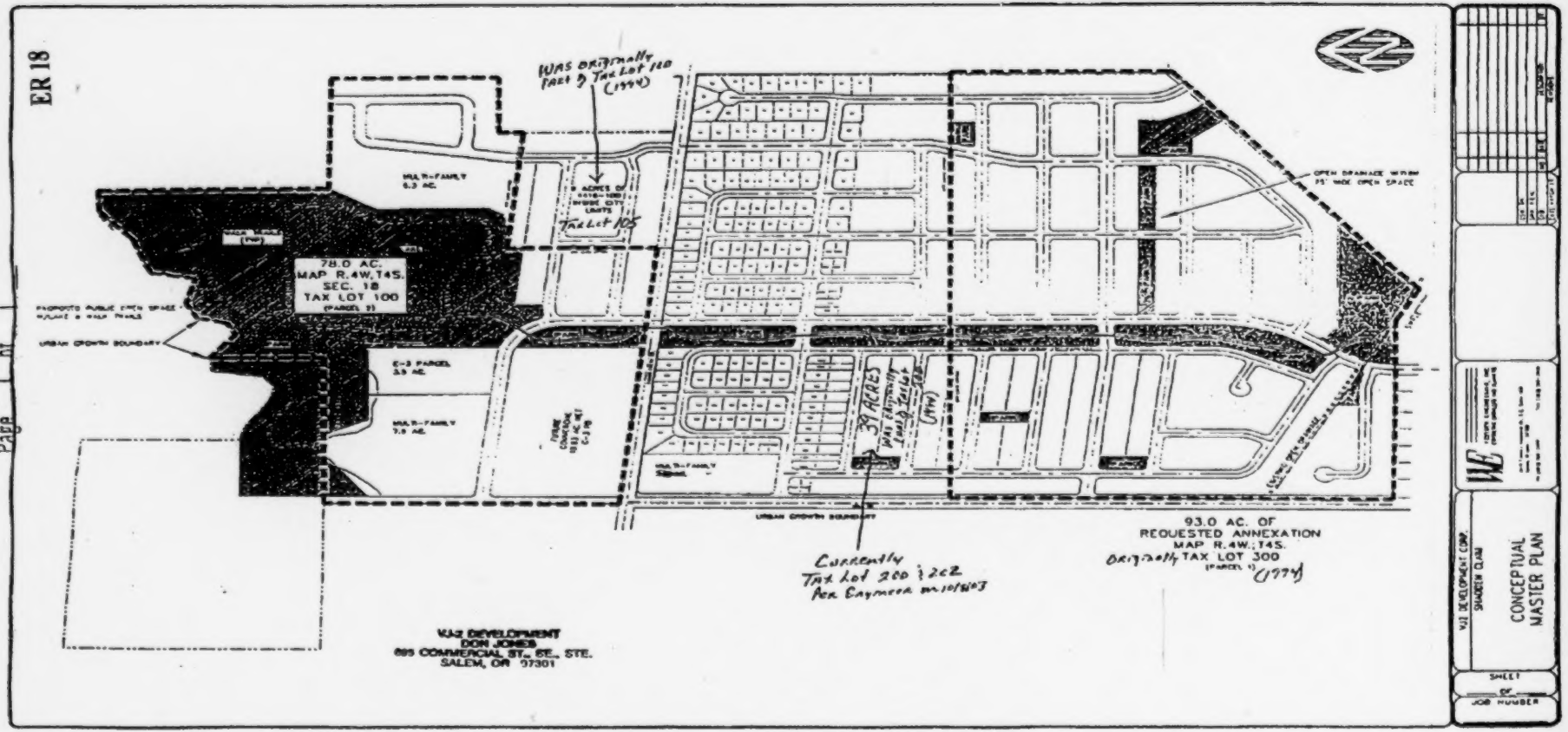


EXHIBIT A
Page 1 of 1

APPENDIX J

IN THE CIRCUIT COURT
OF THE STATE OF OREGON

FOR YAMHILL COUNTY

DON JONES and VJ-2 DEVELOPMENT, INC., an Oregon corporation, Plaintiffs, v. CITY OF MCMINNVILLE, an Oregon municipal corporation, Defendant.	) Case No. CV030428)) NOTICE TO ADVERSE PARTY OF REMOVAL TO FEDERAL COURT)))))))))

TO: JEFFREY S. SEYMOUR AND JOHN W. SHONKWILER, ATTORNEYS FOR PLAINTIFFS

PLEASE TAKE NOTICE that on the 14th day of January, 2004, defendant filed its Notice of Removal in this action in the office of the United States District Court for the District of Oregon, Portland, Oregon. Copies of that Notice of Removal are attached to this Notice.

YOU ARE ALSO ADVISED that defendant, on the filing of this Notice of Removal, has filed a copy of this Notice with the Clerk of the Circuit Court for Yamhill County, Oregon, which has effected this removal in accordance with 28 USC §1446(d).

DATED this 15 day of January, 2004.

HOFFMAN, HART & WAGNER, LLP
By: /s/ Kari A. Furnanz
Kari A. Furnanz, OSB No. 96292
Of Attorneys for Defendant
Trial Attorney: James P. Martin,
OSB No. 81306

James P. Martin, OSB No. 81306
E-mail: jpm@hhw.com
Kari A. Furnanz, OSB No. 96292
E-mail: kaf@hhw.com
HOFFMAN, HART & WAGNER, LLP
Twentieth Floor
1000 S.W. Broadway
Portland, Oregon 97205
Telephone: (503) 222-4499
Facsimile: (503) 222-2301

Of Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

DON JONES and VJ-2 DEVELOPMENT, INC., an Oregon corporation,

Plaintiffs,

v.

CITY OF MCMINNVILLE, an Oregon municipal corporation,

Defendant.

No. CV '04 0047 AA

NOTICE OF REMOVAL OF ACTION

PLEASE TAKE NOTICE that defendant, City of McMinnville (hereinafter "Defendant") hereby removes this action from the Circuit Court of the State of Oregon for the County of Yamhill to the United States District Court for the District of Oregon.

1. Defendants are parties in a civil action brought against them in the Circuit Court of the State of Oregon for the County of Yamhill entitled *DON JONES and VJ-2 DEVELOPMENT, INC., Plaintiff v. CITY OF MCMINNVILLE,* Yamhill County Case No. CV030428. Pursuant to 28 U.S.C. § 1446(a), a copy of the Complaint in that action is attached to this Notice and constitutes all process, pleadings and orders received by defendant, in that action to the present date.

2. The state court action was commenced and the Complaint was filed with the County Clerk for Yamhill County, Oregon, on or about the 10th day of December, 2003. The defendant has filed no pleadings in this case. This Notice of Removal is filed within 30 days after defendant first received a copy of the Complaint. However, proper service has not yet been completed.

3. This action is a civil action over which this court has original jurisdiction under 28 U.S.C. § 1331, and is one which may be removed to this court by defendant pursuant to the provisions of 28 U.S.C. § 1441(b) in that plaintiff alleges violations of 15 U.S.C. §§ 1 and 2 and 42 USC § 1983. The Complaint raises a federal question and, therefore, the cause of action is removable.

4. The U.S. District Court for the District of Oregon has supplemental jurisdiction over plaintiffs state causes of action. Plaintiffs state causes of action are joined with the federal claims and, therefore, maybe removed pursuant to

28 U.S.C. § 1441(c). The U.S. District Court for the District of Oregon also has discretion to adjudicate State law claims pursuant to 28 U.S.C. § 1367(a).

5. Defendant expressly reserves the right to assert all applicable affirmative defenses, including lack of service of process.

6. This notice is signed pursuant to FRCP 11.

DATED this 14 day of January, 2004.

HOFFMAN, HART & WAGNER, LLP

By: /s/ Kari A. Furnanz
Kari A. Furnanz, OSB No. 96292
James P. Martin, OSB No. 81306
Of Attorneys for Defendant
(503)222-4499

CERTIFICATE OF SERVICE

I hereby certify that on the 14 day of January, 2004, I served the foregoing NOTICE OF REMOVAL OF ACTION, on the following parties at the following addresses:

Jeffrey S. Seymour
Attorney at Law
PO Box 1708
Lake Oswego, OR 97035
4040 Douglas Way

John W. Shonkwiler
Attorney at Law
13425 SW 72nd AVE
Tigard, OR 97223

Of Attorneys for Plaintiff

by mailing to them a true and correct copy thereof, certified by me as such, placed in sealed envelopes addressed to

them at the addresses set forth above, and deposited in the U.S. Post Office at Portland, Oregon on said day with postage prepaid.

/s/ Kari A. Furnanz
Kari A. Furnanz, OSB No. 96292
(503) 222-4499
Of Attorneys for Defendant

APPENDIX K

JOHN W. SHONKWILER, P.C.
John W. Shonkwiler, OSB #75337
13425 SW 72nd Ave.
Tigard, OR 97223
Telephone: (503) 624-0917

Of Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DON JONES and **VJ-2 DEVELOPMENT, INC.**, an Oregon corporation, Plaintiffs, v. **CITY OF MCMINNVILLE**, an Oregon municipal corporation, Defendant.	No. 04-CV-47-AA PLAINTIFFS' MOTION TO REMAND [Request for Oral Argument]

MOTION TO REMAND

Plaintiffs Don Jones and VJ-2 Development, Inc., by their undersigned attorney, hereby move this Court for an order remanding the above-entitled action to the Circuit Court of the State of Oregon for the County of Yamhill, the court from which the case was removed by the Defendant to this Court. In the alternative, Plaintiffs seek to stay the removal of the action from state court.

Plaintiffs seek this remand because although Plaintiffs' complaint contains claims allegedly under 28 USC

Section 1331, potentially creating a case within the original jurisdiction of this Court, the issue is not yet ripe for adjudication. The facts, the law-of-the-case and legal precedents concerning this dispute set forth in Plaintiffs' attach memorandum demonstrate that the case is not yet in procedural status making it ripe for adjudication by this or any Federal Court. Hence, this is not now a case or controversy under the provisions of Article III, Section 2 of the United States Constitution and is not justiciable in this honorable court, contrary to the contentions of Defendant's removal petition.

Further, in the alternative, if the Court determines that the separate and independent federal question claims raised by Plaintiffs' complaint, though not yet ripe, are sufficient to permit the removal requested by Defendants, Plaintiffs would move this Court to exercise its inherent discretion to stay this federal proceeding, remanding to the state court all matters in which state law predominates. The appropriateness of this course is also demonstrated by Plaintiffs' memorandum.

In connection with this motion for remand, Plaintiffs further move this Court, if it determines that Defendant's petition for removal was not reasonable given the controlling precedents, for an order directing the Defendant to pay all of Plaintiffs' attorneys' fees, costs and disbursements incurred by reason of this removal of the above-entitled action to this Court.

Dated: January 20, 2004.

/s/ John W. Shonkwiler
JOHN W. SHONKWILER,
OSB #75337 Of Attorneys
for Plaintiffs

APPENDIX L

James P. Martin, OSB No. 81306
E-mail: jpm@hhw.com
Kari A. Furnanz, OSB No. 96292
E-mail: kaf@hhw.com
HOFFMAN, HART & WAGNER, LLP
Twentieth Floor
1000 S.W. Broadway
Portland, Oregon 97205
Telephone: (503) 222-4499
Facsimile: (503) 222-2301

Of Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DON JONES and VJ-2 DEVELOPMENT, INC., an Oregon corporation, Plaintiffs, v. CITY OF MCMINNVILLE, an Oregon municipal corporation, Defendant.	No. 04-00047-AA ANSWER, AFFIRMATIVE DEFENSES AN COUNTERCLAIM OF DEFENDANT **Demand for Jury Trial**

Defendant City of McMinnville answers Plaintiff's Complaint as follows:

1.

Defendant admits that plaintiff Don Jones possesses an ownership interest in VJ-2 Development, Inc. Defendant further admits that VJ-2 Development, Inc. owns

parcels of real property located adjacent to, but not inside, the City of McMinnville.

2.

Defendant admits that the City of McMinnville is a duly incorporated and organized municipal corporation under the laws of the State of Oregon.

3.

Defendant admits that plaintiffs desired to annex and develop the property described in their Complaint. However, the voters denied plaintiffs' request for annexation on at least three occasions.

4.

Except as so admitted, defendant denies each and every allegation contained in plaintiffs' Complaint and specifically denies that it was at fault in any way or that it caused plaintiffs' damages or injuries.

FOR A FIRST AFFIRMATIVE DEFENSE, defendant alleges:

5.

Plaintiffs have failed to issue sufficient service of process.

FOR A SECOND AFFIRMATIVE DEFENSE, defendant alleges:

6.

Some or all of plaintiffs' state law claims are barred pursuant to the doctrine of discretionary immunity.

FOR A THIRD AFFIRMATIVE DEFENSE, defendant alleges:

7.

Some or all of plaintiffs' claims are barred because their exclusive remedy for the alleged wrongs was to appeal to LUBA (Oregon's Land Use Board of Appeals).

FOR A FOURTH AFFIRMATIVE DEFENSE, defendant alleges:

8.

Some or all of plaintiffs' claims are barred by the applicable statutes of limitation.

FOR A FIFTH AFFIRMATIVE DEFENSE, defendant alleges:

9.

To the extent each plaintiff does not have a possessory interest in the property at issue in the Complaint, this case has not been brought by the real party in interest.

FOR A SIXTH AFFIRMATIVE DEFENSE, defendant alleges:

10.

Defendant reserves the right to assert additional claims and defenses which may become apparent in discovery.

FOR A SEVENTH AFFIRMATIVE DEFENSE AND COUNTERCLAIM, defendant alleges:

11.

As a prevailing party, defendant will be entitled to recover its reasonable attorney fees and costs pursuant to ORS 20.105, 42 U.S.C. § 1983, and ORS 646.770(2).

WHEREFORE, defendant demands judgment in its favor and trial by jury.

DATED this 4th day of February, 2004.

HOFFMAN, HART & WAGNER, LLP

By: /s/ Kari A. Furnanz
Kari A. Furnanz, OSB No. 96292
James P. Martin, OSB No. 81306
Of Attorneys for Defendant
(503)222-4499

APPENDIX M

James P. Martin, OSB No. 81306
Kari A. Furnanz, OSB No. 96292
Amy L. Buckler, OSB No. 04140
E-mail: jpm@hhw.com; kaf@hhw.com; alb@hhw.com
HOFFMAN, HART & WAGNER, LLP
Twentieth Floor
1000 S.W. Broadway
Portland, Oregon 97205
Telephone: (503) 222-4499
Facsimile: (503) 222-2301

Of Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DON JONES and VJ-2 DEVELOPMENT, INC., an Oregon corporation, Plaintiffs, v. CITY OF MCMINNVILLE, an Oregon municipal corporation, Defendant.	No. 04-00047-AA DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO FRCP 56 **Oral Argument Requested**

LOCAL RULE 7.1 CERTIFICATION

The undersigned certifies that a good faith effort has been made to resolve the subject matter of this motion and the Court's ruling is necessary on this matter.

MOTION

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56.1, defendant moves for summary judgment as to all of plaintiffs' claims.

Pursuant to LR 7.1(e), the issues to be decided with this motion are as follows:

1. Whether portions of plaintiff's claims are time barred.

2. Whether plaintiffs have sufficient evidence to support their antitrust claims

3. Whether plaintiffs have sufficient evidence to support their inverse condemnation claims.

4. Whether plaintiffs have sufficient evidence to support their equal protection claims.

5. Whether plaintiffs have sufficient evidence to support their remaining civil rights claims.

6. Whether plaintiffs requests for injunctive and declaratory relief should be dismissed.

This motion is supported by defendant's concise statement of material facts, the deposition testimony of Willie Darnell "Don" Jones, Douglas Montgomery, Donald Schut, Edward Gormley, and Richard Windle, the separate affidavits of Amy L. Buckler, Kari Furnanz, Kent Taylor and Douglas Montgomery, with exhibits, the memorandum in support of the motion for summary judgment, and the pleadings on file herein.

Respectfully submitted this 29th day of December, 2004.

HOFFMAN, HART & WAGNER, LLP

By: /s/ Kari A. Furnanz
Kari A. Furnanz, OSB No. 96292
James P. Martin, OSB No. 81306
Amy L. Buckler, OSB No. 04140
Of Attorneys for Defendant
(503)222-4499

APPENDIX N

JOHN W. SHONKWILER, P.C.
John W. Shonkwiler, OSB #75337
13425 SW 72nd Ave.
Tigard, OR 97223
Telephone: (503) 624-0917

Of Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

DON JONES and **VJ-2 DEVELOPMENT, INC.**, an Oregon corporation, Plaintiffs, v. **CITY OF MCMINNVILLE**, and Oregon municipal corporation, Defendant.	No. 04-CV-47-AA AFFIDAVIT OF JOHN W. SHONKWILER

STATE OF OREGON)
ss
COUNTY OF WASHINGTON)

I, DON JONES, being first duly sworn, hereby depose and say:

1. I am the one of the attorneys representing the plaintiffs in the above-entitled matter.

2. I make this affidavit in support of plaintiffs' Memorandum in opposition to Defendant's Motion for Summary Judgment.

3. Attached to this Affidavit as Exhibits 040 through 045 are a true and correct copies of the deposition transcripts of, respectively, Douglas Montgomery, Richard Windle, Clifton Ross, Edward J. Gormley, Donald Schut, and Willie Darnell Jones.

4. Attached to this Affidavit as Exhibit 046 is a true and correct copy of the complaint filed in Yamhill County Circuit Court that I obtained from the Clerk of the Yamhill County Circuit Court.

/s/ John W. Shonkwiler
John W. Shonkwiler

Subscribed and sworn to before me this 8th day of January, 2005.

[SEAL]
OFFICIAL SEAL
LAURIE L. SHONKWILER
NOTARY PUBLIC – OREGON
COMMISSION NO. 373560
MY COMMISSION
EXPIRES OCT. 30, 2007

/s/ Laurie L. Shonkwiler
Notary Public for the
State of Oregon
My Commission
Expires: 10-30-07

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF YAMHILL

DON JONES and VJ-2 DEVELOPMENT, INC., an Oregon corporation, Plaintiffs,	)	
vs	)	No. CV030428
CITY OF McMinnville, an Oregon municipal corporation, Defendant.	)	

DEPOSITION OF DOUGLAS MONTGOMERY

Taken in behalf of the Plaintiffs

Thursday, October 28, 2004

* * *

[17] were residential?

A. The area at the southeast corner of Hill Road and Baker Creek Road was the commercial parcel, I believe it was about five acres in size. The balance, both north and south of Baker Creek Road, which is this road here, were planned for residential development.

Q. Okay.

MR. SHONKWILER: I've got a copy if you need that, you can throw that in your file.

MR. MARTIN: I need a little more paper.

MR. SHONKWILER: Yeah, we all do.

Q. And all of these designations we're just referring to, those are basically urban designations, are they not.

A. They're City of McMinnville designations.

Q. Right. Is that in the category of urban densities?

A. Yes.

Q. Now going back to the urban growth boundary agreement. When someone that owns property out in this UGB area, but outside the city limits, when they want to annex or develop their property at urban uses, who reviews those land use applications under the UGB agreement?

A. A request for an annexation?

[18] Q. A request for an annexation or, say, an urban subdivision development permit application.

A. The development of a subdivision would have to be acted upon concurrent with the annexation. The annexation is the prerequisite to those other actions. So that would be reviewed initially by our office for completeness of the application. As part of the application review process, other departments would be asked to review and comment on that application as well.

Q. Okay. So the essence of that answer is the landowner would have to go to the city first?

A. Correct.

Q. And under the UGB agreement, Yamhill County wouldn't have the authority to grant an urban development within that UGB area?

A. Correct.

Q. All right. Was this UGB agreement entered into before the charter amendment was passed with the city that would allow voter approval of annexations?

A. Yes.

Q. And was the city's comprehensive plan, the one that obtained compliance acknowledgment, was that entered into before the city's charter amendment was passed to allow citizen voter approval of annexations?

A. Yes.

[19] Q. It's a little convoluted, but all right.

Was the city comprehensive plan – scratch that.

Did the city adopt any amendment to the UGB agreement after – let me rephrase this so it's altogether.

Did the city amend the UGB agreement to address any problems that might arise over this voter right to deny annexations?

A. None that I can recall.

Q. Okay. And it's basically the same question did the city amend its comprehensive plan to address this issue of problems that might arise over the citizens voting denials of annexations?

MR. MARTIN: Object to the form. Go ahead and answer.

A. Is your question to respond to potential denials or to the annexation process itself?

Q. To the denials of annexations in the UGB area.

A. No, that was never a focus of any change.

Q. Let's look at the charter amendment for a while here. Was that passed in 1996?

A. I believe it was May 21 of '96.

Q. And it went to the city – citizens for a vote as to whether that would be passed; isn't that correct?

[20] **A. That's correct.**

Q. What was that, November of '96 that it went to the voters?

A. No, it was May 21, 1996.

Q. Oh, May 21? Okay, I'm sorry. All right. I just got things mixed up, I'm sorry.

Tell me what you personally know about the history of how this voter annexation charter amendment started and what process it went through and what requirements there are for it. Just generally give us kind of a history of it, I guess.

MR. MARTIN: Object to the form. Go ahead and answer.

A. By way of background, recall I was Senior Planner at that time and was not at the front of this issue, that was dealt with more by our Planning Director and our city attorney at that time.

I was aware of discussions that were occurring amongst members of Friends of Yamhill County and other people in the community about this issue.

I know that that process requires that they obtain signatures and get a ballot measure placed through Yamhill County clerk's office, which they did. And again, that was the ballot measure that appeared in the May 21, 1996 primary election, in which the voters

* * *

[25] Q. did the city adopt any standards for the voting public within the city of McMinnville for making their decision on this ballot measure for annexations?

MR. MARTIN: Object to the form, but go ahead and answer.

A. No.

Q. Did the city adopt any standards for reviewing the voters' decision on an annexation after the decision had been made and the city council comes back for the adoption of its ordinance?

MR. MARTIN: Object to the form. Go ahead and answer.

A. They take action to canvass the results of the vote. That's the only action that they take subsequent to a vote.

Q. Has the city adopted any ordinance or standards that would apply for lands that are inside the UGB, but outside the city, that had been subject to annexation requests, but denied by the voters?

I know that's a long question.

A. Would you ask – I'm sorry, I'm slow today, could you restate that for me, please.

Q. Yeah. Has the city adopted any standards to review those circumstance where there is land inside the UGB, outside the city limits, that have requested [26] annexation, but had been voted down repeatedly or what – of that nature over a period of time that would give the city council the ability to review that?

A. No.

Q. Has the city adopted any ordinance or policies that would allow alternative approval process for a non-annexed UGB property that had been before the voters and denied annexation?

A. No.

Q. All right. Let's go back to before that charter amendment was adopted by the city. Was Mr. Jones' property, this property in Exhibit A, was that inside the city's UGB?

A. Yes.

Q. But it was outside the city limits, right?

A. Not entirely.

Q. Okay. And which part of it was within the city limits back in 1996?

A. I'll refer to it as the central portion, it's this piece that you can see right here.

Q. Okay. And that would include the commercial?

A. Correct.

Q. So I will make a box around that. Does that look like an adequate box –

A. Yes.

[27] Q. – In the squiggly line?

And we'll mark that as within city boundaries in 1996. Is that correct?

A. Yes. I was actually inside the city prior to '96.

Q. All right. Now, were public facilities and services extended to that section that was within the city in 1996?

MR. MARTIN: Object to the form. Go ahead and answer.

A. They were extended by Mr. Jones as part of his development of the piece of property within the city.

Q. Okay.

A. The city did not extend them, those were done at Mr. Jones' expense.

Q. And the other two portions of that property, the part to the north and the part to the south, were public facilities and services abutting those portions to the north and south?

MR. MARTIN: Object to the form. Go ahead and answer.

A. Difficult to answer. No. They were in part. There were some utilities extended to the very southern edge of the southern parcel, and there were limited utilities extended toward the northern parcel from the [28] **west.**

Q. The question, I guess, I'm asking is could these two parcels have been served, if they were annexed, by an extension of the services that were already out in this area?

A. No.

Q. What additional would have had to have been done?

A. That's probably a question better answered by Mr. Schut, the Community Development Director. But to my knowledge, the northern parcel would have required some at least assessment, if not upgrade, of the sanitary sewer lift station that would serve that property. Also, we would have had to acquire easements across other properties in order to extend that line from where it terminated at that point in time.

Q. All right. Do you know where those easements would have had to have been?

A. They would have been generally in the Baker Creek area.

Q. Okay. And what about the property to the south?

A. I'm not as familiar as to how the services would have been extended or need to have been extended to that property.

[29] Q. Okay. At that time you mean?

A. Mm-hmm (affirmative response).

Q. Because haven't services been extended to that property in the south now?

A. To some of that property.

Q. All right.

A. To the annexed portions.

Q. And we'll get to that.

When the city adopted its UGB boundary in this area outside the city limits, and particularly on the west side here, and that includes Mr. Jones' property that's in Exhibit A, I believe, and correct me if I'm wrong, I believe we've already identified that all of that land out there had been part of the supporting information that the city had submitted to DLCD for approval of the comprehensive plan to meet its various needs, including housing; is that right?

A. That's correct.

Q. All right. Did the city from 1994 till today, did it have a policy to encourage annexation of land in this area west of the city?

MR. MARTIN: Object to the form. Go ahead and answer.

A. Specific to your question, no. We had a general policy encouraging annexation city-wide, not [30] **specific to the west side of McMinnville.**

Q. All right. Well –

A. I believe this is encouraging rezoning and annexations so as to ensure a five-year supply of land.

Q. I'll just draw your attention to comprehensive plan policy 71.00, which reads, "The city shall plan for the

development of property located on the west side of the city to be limited to density of six units per acre." It goes on to talk about encouraging multi-family units on the west side and sewer extensions, and some allowances and trade-offs for that encouragement.

A. But I believe your question was did we encourage annexations on the west side, and I would still hold to that. I believe your reading was to a policy that says that we will encourage densities of six units per acre and certain housing types in west McMinnville.

Q. All right. And has the city adopted any policy to limit annexations to parcel sizes in the UGB area outside the city limits?

A. No.

Q. Did the city have a planning position regarding Mr. Jones' planning annexation requests as to whether they were orderly and efficient extension of [31] services to his property and orderly urbanization for the future needs of the city?

A. Yes.

Q. And what was that?

A. We supported it.

Q. All right, let's talk about periodic review.

You generally talked about what the status of it is. Where are we on periodic review?

A. Under the original periodic review order we have one – excuse me, two tasks that remain outstanding. One is to complete our transportation system plan, and secondly is to ensure that we have enough commercial land for our future needs.

What is getting rolled into that, however, is that because of a quirk in state law, that whenever you amend your urban growth boundary more than 50 acres it then falls under the periodic review process. And that's where we are now, embroiled in a long and contentious battle over the expansion, or planned expansion, of the urban growth boundary.

Q. When you say contentious, who's making it contentious?

A. Right now we have objections primarily from Thousand Friends of Oregon, Friends of Yamhill county, an individual, Mr. Mark Davis.

[32] Q. And approximately how much are you talking about – are you talking about expanding the urban growth boundary, correct?

A. Right.

Q. And how much are you talking about expanding the urban growth boundary?

A. Approximately 900 acres.

Q. And out of that 900 acres, it's not all commercial, is it?

A. About a hundred of that is commercial, the other 800 or so are for residential purposes.

Q. And out of that approximately 800 acres, how many units of residential use are we talking about generally here?

A. For the next 20 years, about 6,000 total units.

Q. All right. We're in 2004.

A. Right.

Q. When are you supposed to conclude this periodic review?

A. There is, to my knowledge, there's no finish or time line set for that process. This was one that was initiated by the city council out of recognition of – or at least an assumption that we were running short of certain types of land.

* * *

[37] [Q.] What – when we are talking about public facilities and services in a planning context, what are we talking about? What type of services?

A. Typically we're talking about sewer, water, streets.

Q. Okay. And other things that people think about is utilities electrical and gas, and all that, that's provided in the private sector?

A. In the city of McMinnville electric and water are provided by McMinnville Water and Light.

Q. Okay.

A. Which is quasi-public.

Q. And power, light, and water, that's not under the direct authority of the City of McMinnville, is it?

A. Correct, power and water are not.

Q. That's a what, what's that called?

A. It's McMinnville Water and Light.

Q. Is it a special service district?

A. No, it's a creature of city charter. They have their own board, which the mayor is an ex-officio member of that.

Q. So it's not a part of the City of McMinnville, but it shares officials with the City of McMinnville?

A. On its board.

Q. And do you know how it was created?

[38] **A. I don't.**

Q. Staying with that subject of public facility services, since we're talking about essentially the city providing sanitary sewer service to the UGB area, you mentioned earlier that the city did have adequate sewage treatment capacity.

Is there some problem physically with extending the sewer lines out to the UGB area on the west side?

A. To the UGB area or Mr. Jones' property specifically?

Q. We'll start with the UGB area specifically.

A. Not that I'm aware of.

Q. And what about extending it to Mr. Jones' property?

A. Other than the ownership issues and acquiring easements, and the cost, I'm not aware of any other issues.

Q. Another planning term. What does buildable land mean in the planning context?

A. It would be a parcel of ground that absent any steep slope or flood plain or wetland or other environmental constraints would be how we would characterize a buildable parcel.

Q. And when we're talking about that in the [39] context of residential development, when you said that you want to expand – the city wants to expand the urban growth boundary by 900 acres, you're talking about 900 buildable acres?

A. Correct.

Q. So you've already excised out all of the non-buildable lands?

A. Correct.

Q. Let's jump back a little bit to 1997, when Mr. Jones' property came up for its first annexation request. At that time did the city have within its city boundaries, city limits, not the UGB, city boundaries, enough buildable residential land to meet the city's projected housing needs to the year 2000?

A. I think at that point we made a finding in the staff report that suggested that we did not.

Q. And is that the same for 1997 and 1998, 1999?

A. I can't remember if we made that same finding for each of those – each of those applications.

Q. But do you have personal knowledge whether the city could have met that projected amount of buildable lands or not during those periods of time?

A. Technically, when we made that finding we were not including lands above the service level, I apologize for this, but the service level of the west hills, so we [40] **discounted about 300 and some acres that were already in the city limits that with the addition of a reservoir could have been available for residential development.**

Q. So that had perceived development restrictions on the west hills there?

A. Correct.

Q. All right. This raises another question related to the annexation denials.

After the voters voted down Mr. Jones' four annexation requests, did the city adopt any findings to support those denials?

A. No.

MR. MARTIN: Object to the form. Go ahead and answer.

THE WITNESS: Sorry.

Q. As I recall, you were – in 1996 you were the Assistant Planning Director. And then in '97 you became the Planning Director?

A. In July of '97.

Q. All right. So going back to Mr. Jones' annexation requests, those four that started in '96 and went up to the year 2000, did you – were you personally involved with the review of those annexation requests from the planning standpoint?

A. In various capacities.

* * *

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF YAMHILL

DON JONES and VJ-2 DEVELOPMENT, INC., an Oregon corporation, Plaintiffs,	)	
vs	)	No. CV030428
CITY OF McMinnville, an Oregon municipal corporation, Defendant.	)	

DEPOSITION OF RICHARD D. WINDLE

Taken in behalf of the Plaintiffs

Thursday, October 28, 2004

* * *

[2] BE IT REMEMBERED THAT, the deposition of RICHARD D. WINDLE was taken before MARK D. KRSKA, a Certified Shorthand Reporter for Oregon, on Thursday, October 28, 2004, commencing at the hour of 10:00 a.m., in the law offices of Hoffman, Hart & Wagner, in the City of Portland, County of Multnomah, State of Oregon.

APPEARANCES:

JOHN W. SHONKWILER

Attorney at Law

Appearing in behalf of the Plaintiffs

JEFFREY S. SEYMOUR

Attorney at Law

Appearing in behalf of the Plaintiffs

HOFFMAN, HART & WAGNER

By Kari Furnanz

Attorney at Law

Appearing in behalf of the Defendant

Also Present: Don Jones

[3] RICHARD D. WINDLE

was thereupon produced as a witness in behalf of the Plaintiffs and, having been first duly sworn on oath, was examined and testified as follows:

EXAMINATION

BY – MR. SHONKWILER:

Q. Mr. Windle, I'm sure you've been informed, but we're here for a deposition. And my name's John Shonkwiler, I represent Mr. Jones, and this involves the lawsuit of Mr. Jones versus the City of McMinnville.

A. Mm-hmm (affirmative response).

Q. So for the record, would you give your full name and your address.

A. Richard D. Windle, present address is 3957 W. Poinciana, P-O-I-N-C-I-A-N-A, Street, Citrus Springs, Florida 34433

Q. Okay. and at any time were you a member of the city council of the City of McMinnville?

A. Yes.

Q. And when was that?

A. It was – it ended July 1st or June 30th of this year, 2004, and started back in 1990 sometime or '89. 15 years.

Q. Okay. And before that were you on some other [4] position with the city?

A. Yes.

Q. What was that?

A. I was a member of the planning commission.

Q. Approximately when was that?

A. That was eight years – almost eight years prior to my joining the city council.

Q. I'm struggling here. Eight years, that would put it back sometime around –

A. Yeah, I don't –

Q. – 1982. All right.

A. That sounds about right.

Q. All right. Just so I'm straight, were you on the city – were you on the planning commission when the comprehensive plan was adopted?

A. No.

Q. That was just before that?

A. That was before I was involved.

Q. Do you remember what date that was?

A. The –

Q. The comprehensive plan was adopted.

A. No. No, I don't really know the date. Because we may have lived in the city, but I don't remember.

Q. Just so I have a little background what did

* * *

[17] Q. So is it fair to say that the city's comprehensive plan and the zoning ordinance have approval criteria already written into them that the city reviews for these annexation applications?

A. To my knowledge, yes.

Q. And then after the planning department does its review of it, what happens to the application?

A. Then if – then it would go to the planning commission.

Q. Okay. And they, again, would review it to see if the approval standards were satisfied; is that right?

A. They would hold a public hearing on it and –

Q. And then –

A. – evaluate the criteria and so forth.

Q. And the planning commission, does it have final authority on the annexation –

A. No.

Q. – or does that have to go up to the city council?

A. Planning commission would review it and either recommend approval to the city council or recommend denial.

Q. Okay. And when it's before the city council, the city council, again, is reviewing to see that approval standards are being satisfied before they make [18] their decision?

A. I'd say that, yeah.

Q. All right. Now let's – after the charter amendment was passed to allow the voters to make this decision, were these approval standards written into the ballot so that the public would go through and evaluate whether the annexation meets the approval standards or not?

(Mr. Seymour leaves the deposition.)

A. I'm not sure I understand. When you say the ballot, you mean what actually the question was that –

Q. Yes.

A. – was on the ballot?

Q. Yes.

A. No, I don't believe so.

Q. All right. Again, let's go back before this ballot measure – or let me rephrase it, before that charter amendment for citizen voting on annexation was passed.

Before that, did the city, to your knowledge, have any policy anywhere that would limit the size of land to be annexed into the city, set some sort of limits, for instance, won't annex land that's over, say, a hundred acres or won't annex land that's under a certain size? Were there any size limitations anywhere?

[19] **A. None that I'm aware of.**

Q. And when this charter amendment was passed, did it include any policy in it that there would be size limitations or annexations?

A. None that I'm aware of.

Q. When this charter amendment – let me rephrase this.

As I understand what you were saying, to get the charter amendment on the ballot, was some document presented to the city council so that they would put it out for a vote?

A. No – well, the request – again, this is my recollection, is that we just had a verbal request, we didn't have, quote, a written formal here, this is what we'd like you to put on the ballot for a charter amendment, it was the subject, the subject was voter approval – citizen approval, voter approval of annexations. I don't know that we had a hard copy.

Q. Okay.

A. So the subject was asked of us, would you do that? We said no.

Q. All right. And then it got on the ballot through the elections division of the county; is that it?

A. The city?

[20] Q. The city, I'm sorry.

A. Yeah.

Q. So it didn't come back to the city council to get on the ballot?

A. I – I don't recall us having to do anything – any further approval, because they turned in a petition with enough signatures.

Q. All right.

A. We might have had to do some pro forma thing, but I don't know.

Q. Now, after – or I'm sorry. There's too much time involved in all this.

Before the charter amendment was passed that allowed the citizens to vote, do you recall if Mr. Jones

came before the city council proposing development of his land that's west of the city and talking about the possibility of annexing that property?

A. I think so. I mean, again, I don't know the exact dates or whatever.

Q. And do you recall that he was requesting a portion of the land to be annexed, not all of it at that time?

A. Yeah, there was a portion of that land that was already in the city limits.

Q. Right.

[21] **A. And there was, as I remember, there was a piece along one side that wanted to be added. And that was an initial request or something.**

Q. Okay. And do you recall, when he came before the city council on that, what did the city council recommend to him to do or tell him to do?

A. I think there was –

MS. FURNANZ: Object to the form of the question. Go ahead.

A. It approved the development of the land that was already within the city, but suggested that if he was going to develop the whole thing that he provide a total plan for that, you know, instead of just taking a little strip at a time.

Q. All right. And do you recall why the city council wanted to have that done that way?

A. Just so it would be, that expression again, orderly and timely, whatever, so the city would

have a picture of the whole what was going to happen totally.

Q. So if I'm understanding you, is it correct that the city council was telling Mr. Jones that they wanted him to annex the whole piece of property and come in with a master plan for the whole piece of property rather than piecemeal it in?

A. We thought that would be the better way to [22] **understand what was going to happen with that property out there, yeah. I guess.**

Q. Was that a unanimous feeling of the city council at that time?

A. I – you'd have to look at the minutes and the vote. I have no idea.

Q. How did you advocate, do you recall?

A. I probably was in concurrence with that, but again, I mean that's – that's like '93 or something, you know, I'm not sure what –

Q. '95.

A. Well, okay. And, you know, I have a tough time remembering yesterday sometimes.

We can look at the – you know, you probably have the minutes.

Q. Yeah, that will be in the minutes of that meeting?

A. Sure.

Q. In fact, I'll quote you something from the minutes of June 27, 1995 of the city council. It says, quote, "the

council reached a consensus that it would like to see the total picture rather than committing to parts of it," close quote.

To the best of your knowledge, can you explain what that meant?

[23] MS. FURNANZ: Object to the form of the question. Can you show that to him so he can see it?

MR. SHONKWILER: Well, yeah.

A. Just read it again.

Q. Okay. It is, quote, "The council reached a consensus that it would like to see the total picture rather than committing to parts of it," close quote.

MS. FURNANZ: Can you show him a copy of those minutes so that he can see it in context?

Q. It's where I've marked it in blue there.

A. (Pause-referring). It says there, I mean we wanted – we would like to have a view of the bigger picture as opposed to just a little slice, in other words.

Q. And when you mean the bigger picture, you mean the entire property that he was planning to develop?

A. Yes.

Q. All right. So is it fair to say then that the city council requested that he not annex just that slice, but that he annex the whole parcel and come in with a plan for the whole parcel?

A. I think fair.

Q. All right. Now, did the city council also request – let me rephrase that.

After that meeting on June 27, 1995, did [24] Mr. Jones work with the city to come up with master plan for his whole property?

A. I believe so. I mean – because a plan was submitted later that covered the whole property. I don't know of the date, but – or dates.

Q. And just another clarification. When we refer to the whole property, some of these documents also refer to it as Shadden Claim.

A. Mm-hmm (affirmative response).

Q. Could you explain what that is?

A. Well, my understanding was that was the term that was used for the area that was along Hill road and Baker Creek Road, from this out to the – there's a creek or something that runs at the far end of it, a swale or something, and I don't know how big totally it was at the time. You know, it was being farmed for grass seed. You know, I don't know the total – the, quote, formal legal description, I don't know.

Q. All right. Now, again, we're still before the charter amendment was passed, but it's after this June 27, 1995 meeting, or right at that time, on. Did you have – at the time did you have any doubts that Mr. Jones should be able to annex his entire property into the city?

A. No.

[25] Q. And when did you start having some doubts that that could happen?

MS. FURNANZ: Object to the form of the question.

A. I have doubts?

Q. Mm-hmm (affirmative response).

A. I never had any doubts.

Q. Okay. But Mr. Jones wasn't able to annex his entire property into the city, isn't that right, over time?

A. I guess that's what happened, yeah.

Q. I suppose that's the direction what my question was, is what's the interceding event that occurred that didn't allow him to annex his properties?

MS. FURNANZ: Object to the form of the question.

Are you able to answer that?

A. Well, I think – what didn't allow him to do it?

Q. Yeah.

A. Was a negative vote by the citizens, subject – after that annexation –

Q. Charter amendment?

A. Charter amendment was passed.

MR. JONES: Can we take a break?

[26] **MR. SHONKWILER: Yeah. Can we take a break?**

MS. FURNANZ: Sure

(Break taken: 10:36 to 10:39 a.m.)

Q. Okay, we're back on the record.

Let's go back to the subject that I was last talking about, which is the passage of the charter amendment allowing the voters to vote on annexations.

Now, there was a delay from this June 27, 1995 meeting until that charter amendment was passed that allowed the voters to vote. And after that charter amendment was passed, the citizens voted down Mr. Jones' various annexation requests. That's the context. All right.

Is it fair to say that that delay in time is what caused Mr. Jones' property not to be annexed into the city?

MS. FURNANZ; Object to the form of the question.

A. No.

Q. Okay. Then why do you say no?

A. Because properties, you know, have been annexed, you know, there were many properties that were annexed after that in other parts of the city.

Q. And what is your opinion as to why Mr. Jones' property wasn't annexed and others were?

[27] MS. FURNANZ: Object to the form of the question.

Are you asking him why the voters voted as they did?

MR. SHONKWILER: I'm asking what his opinion is as to why Mr. Jones' property was not annexed and other properties were annexed after this charter amendment was passed.

MS. FURNANZ: Object to the form of the question. And I just advise you not to guess or speculate in giving an answer, say what you know.

A. The only thing I know is that the properties that were annexed after the – after that amendment passed were not as large as Mr. Jones'. To my knowledge. I don't recall a property that was annexed that had as many acres.

Q. And you're referring to as if Mr. Jones made an annexation request for the whole property at once, that's the context of your statement?

A. I believe that's what he did initially.

Q. Initially. Now, isn't it true that he also came in for annexation requests afterwards that were smaller?

A. Yes, sir.

Q. And had the city annexed other properties that [28] were near the size?

A. I don't know what the sizes of his subsequent requests were and/or any of the others. I mean I don't have that knowledge in my head.

Q. Now, did you support Mr. Jones' development plans?

A. Yes.

Q. Why? What did you think was good about it?

A. It was a fabulous plan, his total plan for that whole area, with the streets, the parks, what do you call it, the underneath the power line, the walkway, or whatever you call it there, path was – you know, little commercial shopping area. It was a very comprehensive and complete plan for that – for that property, and would have been, in my opinion, a fine addition to the city.

Q. Okay. Was there any problem with the city providing extension of public facilities and services out to his property if it had been annexed?

A. No.

Q. Was there any problem with his proposed density of six units per acre? Was that too low or too high?

A. I don't believe so. There was a mixed use – I mean there was some apartments, I think, maybe in

* * *

[33] [Q.] Do you recall that this agreement enabled the city to annex properties before those properties could be urbanized?

A. Yes.

Q. All right. And by urbanized, what do you mean by urbanized?

A. You're the one that used the word.

Q. All right. I'll give you my definition, see if you agree with it.

The difference between urban and rural is if it's inside the city limits and it's urbanized, that means it can be developed at full urban densities, like six units per acre or more. If it's outside the city limits and it's rural, that means it can only be developed at rural densities, which involves exclusive farm use lands, and that sort of thing.

So in that context, that's the big separation for Senate Bill 100, separating rural from urban.

A. Right.

Q. So that's what I mean by urban.

A. All right.

Q. So the question is, when it comes into the city, then it can be developed for urban uses; is that right?

A. Yes, sir.

[34] Q. And if it's kept out of the city it can't be developed at urban uses; is that correct?

A. Not in McMinnville.

Q. Now, after that charter amendment that allowed the voters to deny annexations, were there many annexations that were denied by the voters over time?

MS. FURNANZ: Object to the form of the question.

A. I don't have a list of all the annexations that were proposed and/or passed or denied.

Q. But you did recall that there were a number that were denied by the voters?

A. I don't know.

Q. Oh, all right. Then let's ask it in the context of the urban growth boundary agreement.

Did the city council, while you were on the city council and after that charter amendment was passed, did the city council ever attempt to amend this urban growth boundary agreement with Yamhill County, to make some sort of adjustment for urbanizing land that had been turned down by the voters?

A. No.

Q. Did the city council try to change its comprehensive plan after the charter amendment had passed to deal with any discrepancies because the voters [35] had turned down annexations?

MS. FURNANZ: Object to the form of the question.

Go ahead and answer if you can.

A. I don't believe so.

Q. Did you have any knowledge of – let me put it in the context of time. We're talking before the charter amendment for the voters had passed and Mr. Jones had already been before the city council and the city council told him we want a master plan for the whole thing, we don't want to just annex in a little piece, we want to see the whole thing, and he went back and started coming up with a master plan.

Did you have any personal knowledge of Mr. Jones and the city planners working on – working together on coming up with a master plan?

A. No.

Q. You've never heard any discussions or conversations regarding that, that that was being done?

A. There may have been some mention in passing, you know, department reports, we're working on this, something or other, nothing that's indelibly etched in my mind.

Q. Let's – I want to make a hypothetical for you. So let's say after this June 27, 1995 meeting with [36] the city council that Mr. Jones had not decided to comply with what the city council had wanted, that he wouldn't come back with a master plan, that he wouldn't work with the city on that, but he still came in with an annexation request for his property. Do you think the city council would have looked upon that favorably?

MS. FURNANZ: Object to the form of the question.

If you can answer it. I would advise you not to guess or speculate.

A. I don't know.

Q. What would have been your position?

MS. FURNANZ: Same objection.

A. I'd have to know what the proposal was. I mean we don't know what the – what would have been the proposal that would have been put before us. I mean –

Q. It would be the same one that he had raised the first time that you'd asked him to go back.

A. Probably come up with the same answer.

Q. Namely no annexation till you do the whole thing?

A. Well, if his intent was to have that whole piece of property developed, then we thought it would be good to know what the big picture was. Not, you know, gnat's details, but the big picture.

[37] Q. All right. And again, I'm still in the context of that period of time before the charter amendment was passed.

I'd like you to consider then Mr. Jones and the staff had been working on cooperating to come up with a new development plan, which they did. And take into consideration it's been before the planning commission before it came to you guys on the city council. All right.

To your knowledge, did you or any other city council members have any doubt that Mr. Jones' future annexation requests would be approved by the city at that time?

A. I mean that's speculation, but I have no reason to doubt that.

Q. All right. Considering the circumstances of that meeting in 1995 before the city council, do you believe that Mr. Jones had a reasonable expectation that his future requests for annexations would be given favorable review by the city council if he came in with a development plan for the whole property?

MS. FURNANZ: Object to the form of the question.

Sounds like you're asking him to make a legal conclusion.

[38] MR. SHONKWILER: No, I'm asking him what his belief was at that time.

MS. FURNANZ: Object to the form of the question.

If you had such a belief at the time.

A. I think we would have evaluated it like we did any other proposal, and if the planning department and planning commission had reviewed it and recommended approval, then unless there was some glaring issues that hadn't been resolved at that level, the probability would be that we would approve it.

Q. All right. Now, with the adoption of this charter amendment that allowed the voters to annex – the processing of annexation of land into the City of McMinnville, didn't that remain essentially the same except now the citizens get to vote yes or no on whether it gets finally annexed in or not; is that correct?

A. Yes.

Q. All right. To your knowledge, is the intent of the city to assure that all citizens be treated equally and fairly when it comes to matters of annexation proposals, requests?

A. Yes.

Q. To your knowledge, would you say that specific ascertainable approval standards are designed into the [39] city's comprehensive plan zoning ordinance to assure

that decisions made by the city will be applied equally and fairly to everybody that makes an application?

A. As far as I know.

Q. All right. I think we've already raised questions before that there are approval standards as part of this annexation process for review. And is it fair to say that, again, is to be applied equally and fairly to every person that makes an application?

A. Yes.

Q. All right. Now, I guess this is kind of a repeat of a question I had before, but I just want to make it clear.

So to your knowledge, this is after the charter amendment now has passed and the voters are now voting on the annexation applications, to your knowledge, are there any specific approval standards that the citizens, when they make that vote for approval or denial, is there any specific approval standards that's put before them that the citizens would then be treating every person equally and fairly?

MS. FURNANZ: Object to the form of the question.

A. Do we publish a comprehensive plan with each ballot title? No. I mean –

[40] Q. Do you recall what's in the ballot –

MS. FURNANZ: Excuse me, he hadn't finished.

MR. SHONKWILER: He had more to say? I'm sorry.

A. Just, you know, the question is – the question, meaning the ballot issue, is shall this land be annexed? And there's a statement that is prepared by the planning department and approved by the council that is the ballot issue, and it's supposed to be factual, it's not supposed to be whatever, you know, pro or con, I guess even.

Q. And that ballot statement, that's all that goes before the city – the citizens when they make their vote?

A. Yes, sir.

Q. And to your recollection, that basically just asks for a yes or no; is that right?

A. That's the choices, yeah.

Q. Is there any provision that you recall in there that allows the voters to approve with conditions, for instance?

A. No.

Q. From your personal knowledge, would you say that the voters then are not given standards to make their decisions by in that ballot measure?

[41] MS. FURNANZ: Object to the form of the question.

A. All the comprehensive plan information, all the records of the ballot – of the process, the application, the write-up by the department, the review by the planning commission, they're reviewed by the city council, that's all public record and all available to every citizen, you know, in the county or wherever. I mean anybody can come in

and look at it. And so they're available for all the citizens to – you know, if they so choose to do that.

To my knowledge, it's not a requirement of the electoral process that citizens, you know, exercise fair and impartial judgment in casting a ballot.

Q. All right.

A. I wish it were. I shouldn't say that, but – I mean I wish it were. Honestly, personally I wish it were.

Q. Okay. Well, now let's take Mr. Jones' annexations requests, there were four of them, after that charter amendment was passed.

To your knowledge, was there any compelling governmental reasons not to approve those annexations?

A. No.

MS. FURNANZ: Object to the form of the [42] question.

Q. Let's – now, are you aware that about a third of Mr. Jones' property was subsequently acquired by other entities, namely the school district and Alan Ruden?

A. Mm-hmm (affirmative response).

Q. And there was approximately 12 acres of land that the school district purchased. And was that land annexed into the city?

A. I believe so.

Q. So that land was approved by the voters?

A. I believe so.

Q. And the land that Alan Ruden acquired from the Shattuck – Shadden Claim, was that annexed into the city, also?

A. There have been a couple, I believe.

Q. And do you have any knowledge of how the school district came about to find that property – that 12 acres that used to belong to Mr. Jones?

A. I mean I wasn't party to any of that.

Q. Okay. Does the city have some written or unwritten policy to help the school district find property?

A. Not that I'm aware of.

Q. Have they done that in the past?

[43] **A. I'm sure they may go to the planning department and say what land is available, just as anybody else comes in and says, you know, I'd like to do something, where's the space?**

Q. So they haven't come before the city council and asked the city counsel to help them find locations?

A. No.

Q. To your knowledge, does the mayor ever help out the school district to find new properties?

A. No, I'm not aware of it.

Q. The 12-acre site that the school district acquired, to your knowledge, is that for a future school use?

A. Certainly.

Q. So they weren't doing that – they didn't acquire that land for investment purposes or to develop it as residential?

A. I don't think they're allowed.

Q. All right.

A. But I don't know.

Q. So that 12 acres is not going to be included then in the city's calculation for needed housing when it seeks to expand its urban growth boundary; is that correct?

A. No. I mean I don't believe it is. Again, I [44] **don't remember every detail of the urban growth boundary expansion proposal.**

Q. Okay. Give me a minute here, we kind of jumped around a little bit, so I'm catching up.

While you were on the city council, do you recall any instance where the city extended urban services outside the city limits, such as sewer, urban streets, and all that stuff –

A. No.

Q. – without requiring that that land first be annexed to the city?

A. No.

Q. Are you aware of any other public entity or other method that someone, a landowner, could obtain urban public facil – or urban facilities and services, such as sanitary sewer treatment, all that, other than the city for that area inside the urban growth boundary?

A. No.

Q. You left the city council on July 2004, right?

A. Yes, sir.

Q. Do you recall that Mr. Jones came before the city council in July of 2003 and requested that the city extend public facilities and services to his land out there in the UGB?

A. Yes, sir.

* * *

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF YAMHILL

DON JONES and VJ-2 DEVELOPMENT, INC., an Oregon corporation, Plaintiffs,	)	
vs	)	No. CV030428
CITY OF McMinnville, an Oregon municipal corporation, Defendant.	)	

DEPOSITION OF EVERETT CLIFTON ROSS

Taken in behalf of the Plaintiffs

Thursday, October 28, 2004

* * *

[17] Q. During the first application process that Mr. Jones went through with the city, was there any defect in the proposed annexation requests made by him that would have been a basis of denial for the city?

A. Defect, no, not based on defect.

Q. During the planning commission process, did the planning commission find any defects that would support denial of his annexation request?

A. Not that I recall.

Q. Then we go up to the city council phase. Was there any defect during that public hearing process, before the city council, where the city council could have found for denial?

A. In terms of legal defects, no.

Q. Are you aware of any, during that same process, were you aware of any lack of compliance with state law or federal laws or regulations that would have formed a basis for denial of his annexation requests?

A. Not that I recall.

Q. Is that the same answer for his subsequent annexation requests?

MS. FURNANZ: Object to the form of the question to the extent you're asking about any that came into effect when he was no longer the city attorney.

A. For those things that occurred while I was [18] **there, to the best of my recollection, there were no defects that were brought to my attention.**

Q. During that time you were there for those annexation requests, did any local agency, such as the school district, fire, police department, raise any concerns or issues that would have been a basis for denial, that you recall?

A. My recollection is that the school district opposed almost every annexation. School districts were always crowded.

Q. And how did the city council handle those comments from the school district, as far as making a decision on approval or denial of an annexation?

A. Well, my recollection is that the fact schools are overcrowded and don't have student space is not a basis for denial of an annexation.

Q. Are you basing that on the state statute that relates to that or some other purpose?

A. No, I would suspect that that's more based upon case decision.

Q. Were there any – during this same background of the questions I was asking about regarding the annexations while you were city attorney, Mr. Jones' annexations, were there any violations or noncompliance of any provisions of the city's comprehensive plan or [19] zoning ordinances that could have been a basis for denial of his annexation requests?

A. Not that I'm aware of.

Q. You attended city council hearings, public hearings, on these annexation requests?

A. Yes, sir, I did.

Q. And did you attend any that involved Mr. Jones' annexation requests?

A. Yes, sir, I did.

Q. Prior to the charter amendment being adopted, did the city council ever adopt a policy or a regulation or a resolution not to accept annexation applications until the charter amendment had been adopted?

A. Not that I recall.

Q. And while you were attending these public hearings on Mr. Jones' annexation applications, at any time did the city council members discuss advising Mr. Jones to withhold his annexation application until the charter amendment had been passed or not passed?

MS. FURNANZ: I just object to the form of the question to the extent you're asking about him giving legal advice to council in executive session.

MR. SHONKWILER: I'm not, I said public hearing.

A. I don't recall such an event. I don't recall [20] **it.**

Q. Do you recall ever the city council discussing with Mr. Jones during a public hearing advising him to make an application for a smaller annexation or some modification downward?

A. At one of the applications he submitted, I would suspect that that is true, but which one, I don't know.

Q. What do you remember about it?

A. I remember that the general perception at the time was this was a good application and that there was a desire to try to facilitate Mr. Jones bringing the property in.

Q. And I'm going to ask you a question about a newspaper article, okay? This is the McMinnville newspaper, and it's back in February of 1999. And in this newspaper article they're interviewing you and they're describing you as the city attorney at that time. And you gave this quote. First I'll ask if the quote is accurate.

The quote is, in reference to Shadden Claim, which is Mr. Jones' –

A. Right.

Q. – property, that it hadn't been annexed into the city, and your quote is, quote, "This is by far the

* * *

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF YAMHILL

DON JONES and VJ-2 DEVELOPMENT, INC., an Oregon corporation, Plaintiffs,	)	
vs	)	No. CV030428
CITY OF McMinnville, an Oregon municipal corporation, Defendant.	)	

DEPOSITION OF EDWARD J. GORMLEY

Taken in behalf of the Plaintiffs

Thursday, October 28, 2004

* * *

[21] **A. I don't remember.**

Q. Did you have any feelings about whether he should rush in his annexation application before the charter amendment was passed or not?

A. I don't remember. As you ask the question, I don't remember that, no.

Q. All right. Let's take after the charter amendment was passed for the annexation right of the public to vote on it. In 1996 I believe Mr. Jones submitted an annexation request to the city that made it up to the city council. Do you remember that annexation process?

A. Again, I'm really sorry, I have poor memory of -- I mean 1997 - I remember that Mr. Jones

submitted an application several times, I don't know if it was in '96, '97. I don't remember the dates.

Q. Okay. Do you remember approximately what the sizes of his annexation requests were?

A. Not right offhand.

Q. And do you remember approximately how many he submitted to the city?

A. How many attempts?

Q. Annexation requests, yes.

A. Three or four.

Q. And what happened with those?

[22] **A. They were defeated.**

Q. How were they defeated?

A. By simple majority, by the public.

Q. Okay. So were they approved in each case by the planning commission?

A. Yes, sir.

Q. And were they approved in each case by the city council?

A. Yes.

Q. So –

A. I'm sorry, I don't know if they were approved by the planning commission in each case. I think the council at some point in time might have

held their own hearings and overrode the council – the planning commission.

Q. All right. But you do remember the city council in each case –

A. It would not have made it to the voters without the council doing it.

Q. Now, out of – you recall the property that Mr. Jones had back in 1995, 1996, on to about year 2000, that was outside the city, if I remember your testimony?

A. I vaguely do, yes.

Q. Has any of that property come into the city now?

[23] **A. I believe it has.**

Q. Describe what has come in.

A. I think the property that Alan Ruden is developing was part of Mr. Jones' property in those years.

Q. Any other property?

A. There may be, but the only property I'm familiar with is Ruden's.

Q. Is it possible that the McMinnville School District has brought some property in that used to belong to Mr. Jones' parcel?

A. I don't know if they have or not. I don't remember.

Q. And Alan Ruden's portion of that original property belonging to Mr. Jones, that went through the whole process, and the voters approved it to come in?

A. Yes.

Q. And do you remember approximately when Alan Ruden's property came into the city?

A. I think over the last couple of years.

Q. And was Alan Ruden using – proposing to use the property differently than Mr. Jones, that is other than residential, for instance?

A. You know, I – I – my recollection is he's using it differently.

[24] Q. What is your recollection? How differently?

A. Well, Mr. Jones' development had many amenities planned out throughout it.

Q. What do you mean by –

A. Greenways with parkways, bike paths, and things like that. I don't know that Mr. Ruden's pieces have all those things in it like he had them planned. I mean it would be very easy to compare the two, but I don't remember. I just have a sense that they don't.

Q. How about the underlying – what I call the underlying use of, say, residential, is his residential?

A. It's primarily – yeah, I think it's all residential, yes.

Q. And this southern portion that Mr. Ruden has taken into the city, was that generally residential when Mr. Jones was proposing it?

A. I don't remember his plan that specifically, but I think there might have been some commercial involved in it, in that area. I – I just remember one time we had a discussion, Mr. Jones, about some commercial space, and I'm thinking it was one of those areas off of Hill Road.

Q. Can you tell me who Alan Ruden is? What do you know about him?

A. I need to speak –

[25] MS. FURNANZ: Object to the form of the question.

A. – to my attorney.

MS. FURNANZ: You want to take a break?

MR. SHONKWILER: Sure.

(Break taken: 1:57 to 2:00 p.m.)

Q. Are you ready to go back on the record?

A. Would you repeat your question, please?

Q. Yes. Would you tell me what you know about who Alan Ruden is?

A. Alan Ruden went to Linfeld with Don, they played ball together, he's a builder in McMinnville.

Q. That's all you know about him?

MS. FURNANZ: Object to the form of the question, argumentative. Is there something specific?

Q. Do you know more about him than just that?

A. He was an applicant for city council.

Q. When was that?

A. Within the last two and a half months.

Q. And has he developed any property inside McMinnville?

A. He has developed quite a bit of property inside of McMinnville, yes.

Q. Over what span of time?

A. Since probably the middle '80's.

[26] Q. And has he ever annexed property into the city besides this recent annexation that involved part of Mr. Jones' property?

A. Yes, I believe his Park Meadows subdivision was annexed into the city.

Q. And how large is that, do you recall?

A. I don't know, maybe 10 acres. Five or six acres two different times.

Q. Have you personally known Mr. Ruden for a period of time?

MS. FURNANZ: Object to the form of the question, vague.

You can go ahead and answer if you can.

Q. Can you answer?

A. Is there something specific you want to ask me?

Q. We'll take it one step at a time.

Do you consider yourself and Mr. Ruden friends?

A. No, I do not.

Q. Have you ever attended parties together?

A. I believe he attended the Mayor's Charity Ball one time.

Q. Have you ever had a business relationship with him?

[27] **A. He's been a client of mine, yes.**

Q. And explain that. What do you mean?

A. I'm a plumbing-heating contractor, and since the '70s we have done – my company has done work for him off and on.

Q. And would that involve some of this property that was developed inside the city?

A. Park Meadows, yes.

Q. And when did you have that relationship with him, from when to when?

A. Maybe 1979, '80, when he first started working in McMinnville.

Q. And are you still in the contracting business?

A. Yes, I am.

Q. And you haven't done any work with him or for him since then?

A. I haven't done any work for him in about 10 years.

Q. And you stated that you didn't characterize your relationship with him as a friendship. Why is that?

MS. FURNANZ: Object to the form of the question.

Q. Why don't you consider yourself and Mr. Alan friends – Ruden friends?

[28] MS. FURNANZ: Object to the form of the question. What are you – can you be more specific in what you're asking? I'm not sure what this has to do with the case. I mean it's a personal issue as to who he's friends with.

MR. SHONKWILER: He's sitting on the city council, Alan Ruden is a participant in this annexation process, I think it's relevant.

So the next question is, why don't you consider Alan Ruden and yourself friends?

A. I have a lawsuit filed against him.

Q. Okay. And what's that about?

A. It's about having built a house and defective construction work. It's an approximately $200,000 claim.

Q. And when was that – is that lawsuit current?

A. It is.

Q. So it hasn't been resolved yet?

A. No, it hasn't been.

Q. And you filed the lawsuit against him?

A. Yes, I did.

Q. And how long ago did you file it?

A. Two years ago.

Q. Welcome to the judicial process. Sorry.

A. Welcome to stucco.

[29] Q. Yeah. I understand that.

And where was that lawsuit filed?

A. Yamhill County court.

Q. Now, do you recall who was on the city council as council members back in 1996? It's going to get worse. I've got through year 2000, so –

A. Dick Windle, Rick Olson, Tino Aleman, Bob Payne. Sandy Rabe.

Q. Okay.

A. Mary Massey.

Q. And how about from 1997 through '98 through '99, 2000, was there much change or –

A. There might have been with Mary Massey and Sandy Rabe getting off the council.

Q. All right. Of your own recollection, do any of those council members know Alan Ruden?

A. Not to my knowledge.

Q. You've never heard any of them talk about him during council sessions or privately out in the hall?

A. During that time period?

Q. Yes.

A. Mr. Ruden I think had left McMinnville about that – about 1997 or so.

Q. Okay. How about before then?

A. I don't recall.

[30] Q. Do you recall if there was any relationship between Alan Ruden and Mrs. Massey?

A. And who?

Q. Massey. Did I mispronounce her name? Massey.

A. Oh, Mrs. Massey?

Q. Yeah.

A. Not that I'm aware of.

Q. Previously you were testifying that Alan Ruden's annexation applications that had been brought into the city –

A. Within the last year or so.

Q. Right. They didn't include as much amenities as what Mr. Jones –

A. To my recollection, yes.

Q. Is the difference between including these amenities and not including these amenities, is that an issue that's important to the city?

MS. FURNANZ: Object to the form of the question.

You can go ahead and answer from your perspective.

A. I don't think legally, but conceptual, yes.

Q. And what's important about it conceptually?

A. Mr. Jones' plan was a great vision for the community for the future, for a long period of time.

[31] Q. And Mr. Ruden's plan is not?

A. Very much like McMinnville's has been in the past, little pockets of land that get annexed and houses put on them, with little planning for the future.

Q. So is it fair to say that you would characterize what Mr. Jones was proposing as timely and orderly provision of housing for the city?

A. I always personally thought so.

Q. And you don't feel that way about Mr. Ruden's annexation?

A. No, sir, I do not.

Q. Has the city adopted any process for correcting that problem of piecemeal annexations that don't provide the kind of orderly amenities that you feel the city needs?

A. Again, to answer your question, I stated my personal views. I think the city probably meets all legal requirements for orderly transitions and utilities, and things like that.

Q. Let's go back to that question again.

I'm talking about from a planning concept for the city, it can be a personal opinion, I'm still asking whether the

city has adopted – city council has adopted anything to correct this shortfall that apparently you're alluding to?

[32] MS. FURNANZ: Object to the form of the question.

A. Again, I stated my personal opinion. The city is meeting all its legal requirements. For many people that's more than enough. This is a democracy.

Q. What about the 900 acres you're proposing to be annexed into the – I mean brought into the UGB, isn't that an adjustment of some kind?

MS. FURNANZ: Object to the form of the question.

A. I don't understand, the way you've phrased the question, what you mean, it's unclear.

Q. Your city's proposal to increase the urban growth boundary by 900 acres, is that not a method that the city's used to correct some shortfall that has occurred?

A. The only shortfall that I'm aware of is our failure to plan for parks adequately, and so we have devoted I believe a third of our lands to potential parks or park-like reserves.

Q. When you refer to a third of your land, you're referring to 300 acres out of that 900 acres is going to be parks?

A. It's actually I think 300 plus acres that would be designated in some fashion park-like or parks,

* * *

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF YAMHILL

DON JONES and VJ-2 DEVELOPMENT, INC., an Oregon corporation, Plaintiffs,	)	
vs	)	No. CV030428
CITY OF McMinnville, an Oregon municipal corporation, Defendant.	)	

DEPOSITION OF DONALD SCHUT

Taken in behalf of the Plaintiffs

Thursday, October 28, 2004

* * *

[29] [Q.] when this UGB agreement was entered into, has Yamhill County ever provided sanitary sewer in the UGB area?

A. In the City's UGB area?

Q. Yes.

A. The county does not provide sewer services.

Q. Now, you've indicated that the city has allowed a sanitary sewer pumping station near this site previously. Is that an approval function that is not uncommon in the city?

A. Yes.

Q. And where does that usually occur? Why?

A. Why does a pump station get approved?

Q. Yes.

A. Just as I described earlier, the same thing happened on this parcel as we were talking about on Mr. Jones' property, so the southerly half of it could drain naturally into – collect by gravity into the existing system, the northerly portion of it is too low, and they had to put a pump station in to pump up on the hill.

Q. So the city's preference would be gravity fed if it can, but if it can't, then a pump station –

A. Right.

Q. – becomes a reasonable alternative?

A. Yes. And we try to limit those. This is also [30] **a pump station that in – a temporary pump station, that's not a permanent location for it.**

Q. Now, you were present at the city when Mr. Jones came in to the city with his annexation request for this property back in 1976?

A. Not '76.

Q. 1996, there we go. I'm sorry. We've had some dates confused earlier this morning and I haven't quite got over that.

A. Which property are you talking about again? Because he's been in several times on different property, so –

Q. I'm talking about in 1976, when he came in and asked for annexation of this portion to the north, which I'll

mark on the map as A, and this portion to the south, which I'll mark as B.

A. So both major parcels?

Q. Yeah.

A. Yes, I was.

Q. Okay.

A. In '96.

Q. I kept saying '76? I apologize. When I said '76, I meant '96.

I'll explain why those got mixed up. That's my daughter's birth date, 1976. And it is her birthday [31] and it's on my mind, and I apologize. Age is creeping in here.

Back in 1996, when Mr. Jones brought those – brought the annexation request to the city for those two parcels, is it fair to say that the city could annex that property, and all of that property would have been reasonably available for public facilities and services?

A. Yes, they would have been reasonably – he would have been required as all of developers, to extend it on-site, but there were services available adjacent to the site, other than the very northerly piece, where the pump station is.

Q. And is it fair to say that the subsequent annexation requests for, and I may get these dates mixed up, but I meant the other three that followed after that, for '97, '98, '99 and 2000, were the services continued to be adequately available?

A. Nothing had changed in the area.

Q. Were you in attendance of the city council public hearings on those annexation requests by Mr. Jones?

A. Some of them I was. I couldn't say that I was at every one of them, but –

Q. Okay. Do you recall at any of them the city discussing with Mr. Jones the idea that he should [32] attempt to annex a smaller parcel than what he was annexing? Or proposing to annex?

A. That was discussed at some of the meetings, yes.

Q. And what was said, do you recall?

A. I don't recall.

Q. Do you recall generally, was it an advocacy to seek a smaller one because the citizens had voted down prior annexations?

A. I would – I would frame it that way, that it was trying to get a package that they thought the citizens might support.

Q. And did Mr. Jones come in later with smaller annexation proposals?

A. Yes, there were some.

Q. Did the city pass a bond measure for extending public facilities out towards – or out past Mr. Jones' property before 1996?

A. A bonds measure? I'm trying to think.

The only bond measure that we passed for public services was a transportation bond, and that was about at

that time frame, but I can't give you a specific date on it. I think it was '96.

Q. Okay. Do you remember how much approximately the bond measure was for?

* * *

[37] that goes. Okay, good, thank you.

Is it true that all the property that Mr. Jones and VJ-2 Development wanted to annex into the city, that was all located within the urban growth boundary since 1981?

A. I don't know that for sure.

Q. Okay. Was it all inside the urban growth boundary since 1996 to today?

A. Yes.

Q. Okay. How about 1994, do you recall that?

A. I believe it was, yes.

Q. Has the city been planning for and expecting that this property here on the west side where Mr. Jones' property is located would be at some time annexed into the city and developed in accordance to the city's comprehensive plan zoning ordinances?

A. Yes.

Q. Within the city, did the city staff have an idea as to when that property ought to be annexed, like quickly or much later, or what?

MS. FURNANZ: Object to the form of the question.

A. Yeah, those aren't decisions that we normally get involved in at all. I mean we're there to provide a service and, you know, we don't try to second guess when [38] **a property is coming in.**

Q. Okay.

A. We respond to their request.

Q. All right. That's what I was – that's the question I'm getting to, is that these annexation requests are based upon when somebody makes an application?

A. That's correct.

Q. So the city hasn't adopted a priority rating?

A. No.

Q. Again, looking at Mr. Jones' property as identified on Exhibit 1 there, and also assuming the development proposal that he made for that property as part of his annexation requests, do you recall that?

A. Mm-hmmm (affirmative response).

Q. All right. Is it fair to say that his proposed number of residential, commercial, and multi-family for that property, that that property could have been developed, if it had been annexed, at that densities and it would have had adequate streets, all of the conditions of approval could have been met?

MS. FURNANZ: Object to the form of the question.

A. The – again, the city services were planned to serve that, and that would not have been an issue. [39] **The on-site development would have been**

at his direction. So it wasn't there at the time it was being proposed. Could it have been built? Yes at his expense.

Q. That's the question I was asking.

Let's talk about on-site for a second. When a vacant piece of ground that's buildable comes into the city, or whether it's in the city or it's annexed into the city, the issue is, does the city usually require the landowner to build the on-site improvements?

A. Yes.

Q. And the landowner has to do that at his own expense?

A. That's correct.

Q. And is it fair to say that that's well understood in the development community as well as –

A. I believe it is. It's pretty standard operating in almost any entities.

Q. Are you aware of any infrastructure component that is necessary for developing Mr. Jones' property that's not available or couldn't have been made available for development?

A. Again, the only one that would have maybe been difficult would be sewer service to that north end. You know, we did not get into an evaluation of the capacity [40] **of that downstream sewer.**

Q. And also the city hasn't addressed the issue of whether a pumping station would have taken care of it either?

A. That's what I mean, we hadn't looked at whether a pump station could have pumped to a downstream sewer with capacity, and there was no sewer adjacent to that on the north side there to catch it.

Q. So that's the only issue for infrastructure?

A. Right.

Q. Okay. I guess along with that, considering your knowledge of Mr. Jones' annexation proposals and VJ-2 Development's annexation proposals, can you think of any public health, safety or land use requirement that would be a sound basis for denying these annexation requests at that time, 1976 through year 2000?

A. '96?

MS. FURNANZ: Object to the form of the question.

Q. Did I do it again?

1996 to year 2000.

MS. FURNANZ: Object to the form of the question.

A. Can I think of any – could you –

Q. Any public health, safety or land use [41] requirement that would have formed a sound basis for denial?

A. No.

MS. FURNANZ: Object to the form of the question.

Q. Did you ever have conversation with Mr. Jones regarding these annexation requests?

A. Many.

Q. Okay. Back before 1996, did you ever have any conversations with him regarding submittal of an annexation request before the charter amendment was adopted to allow the public to vote on annexations?

A. Did I have any conversation before the charter amendment with Mr. Jones?

Q. Yes.

A. Yes, we –

Q. Okay. Do you recall what was discussed at that time?

A. At this time he was just getting started on the project, and we were discussing master plan layouts and different concept plans for the whole site.

Q. But I'm referring to when the charter amendment was being proposed, it hadn't been adopted yet, but it was being proposed. Was there any discussion about that he should rush in and get it in [42] annexation before or he should hold off, or anything of that nature?

A. I didn't have any conversations like that with him, no.

Q. And how about afterwards, after it was passed?

A. Again, I – I did not have conversations regarding the actual annexation events with him or the actions. My involvement typically was in the

master planning of the sewers and streets and storm and the layout of the site.

Q. And I'm making this reference not just to a conversation of you and Mr. Jones, if you were in a meeting with other people that that subject came up.

A. I do not recall it coming up.

Q. Okay. I'm going to change subjects on you.

A. All right.

Q. Let's talk about building permits and growth and that.

I'll be candid, I was reading in the paper, and it said that – and these are not all, the news media takes the easy one and says single family residential permits.

But anyway, they were showing that the city had 114 permits in the year 2000, 190 permits in the year 2002, that it had gone up from 114 to 190 in [43] between year 2000, but they didn't give the number for that, year 2003 was 217, and that it was projected to continue climbing to 2004.

Do those figures sound –

A. They sound reasonable, yes.

Q. Okay. What about overall building permits, including commercial and multi-family, have they been rising through that same period of time generally?

A. The commercial and industrial ones don't really follow the same kind of trends. You'll get a splurge, a shopping center that comes in, and there's a whole series of permits because of the

tenant improvements, and things like that, along with the major improvement, and then you won't see any for a while. So it kind of has its ups and downs. But there has been a lot of commercial development in the community.

Q. So is it fair to say that commercial-industrial tend to cycle, and residential, including multi-family, tend to go on an even pattern, generally?

A. Generally.

Q. Okay. What about from 1996 through the year 2000, how was the growth in the city building permit-wise?

A. Well, again, the residential has been fairly [44] **static, it's been a fast growing community.**

Q. Okay. Forgive me here. We skipped around a little bit so I've got to catch up where I was.

A. Okay.

Q. I see that we've covered a lot of this already.

How would you characterize the growth of urbanization west of the city, the area where Mr. Jones' property is located? Has that been generally growing?

A. It has been – you're talking specifically on the property that he was involved in or all of the west or –

Q. Let's take them one at a time, his property and then separately just generally the west side.

A. The west side has been the area where the growth in community primary has occurred. There's been some in the north area, but the bigger share of it is in the west side of the city.

Q. And how about on his original 219 acres?

A. In the last few years there's been some additional growth in that area, also.

Q. Okay. And has that been on what this map marks as parcel B?

A. Yes.

Q. All right. That would be the southern third?

* * *

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF YAMHILL

DON JONES and VJ-2 DEVELOPMENT, INC., an Oregon corporation, Plaintiffs,	)	
vs	)	No. CV030428
CITY OF McMinnville, an Oregon municipal corporation, Defendant.	)	

DEPOSITION OF WILLIE DARNELL JONES

Taken in behalf of the Plaintiffs

Tuesday, September 7, 2004

* * *

[5] Q. What was the issue involving the car?

A. Did not brake the way it was supposed to.

Q. Were you the plaintiff? Were you suing somebody?

A. Yes.

Q. Where was that case filed?

A. Eugene, I believe.

Q. Have you given sworn testimony on any other occasion?

A. Yes. I worked for the City of Eugene; the same school district for years.

Q. In what capacity?

A. As an administrator.

Q. If you don't understand one of my questions, I'm going to assume you understand it. Is that fair?

A. That's fair.

Q. If you want to take a break at any time, let me know and we'll stop. Okay?

A. Okay.

Q. Have you reviewed anything to prepare for your testimony today?

A. Yes.

Q. What have you reviewed?

A. The Complaint.

Q. Anything else?

A. Well, I'm familiar with all of the issues involved.

[6] Q. Sure. But specifically to come here this morning and give your testimony, did you look at any other documents other than the Complaint?

A. Well, I've looked at all of the documents that we've had for a long time. You know, I do it pretty much on a daily basis. So I guess.

Q. Other than speaking with your lawyers, have you talked to anybody else about your deposition?

A. No.

Q. What ownership interest, if any, do you have in the VJ-2 Development?

A. I'm the owner.

Q. A hundred percent owner?

A. Yes.

Q. Who owns the property at issue?

A. I do. VJ-2 Development.

Q. Well, do you own it as Don Jones or does VJ-2?

A. VJ-2 Inc.

Q. You, as an individual, have no ownership interest in the property, correct?

A. Being the owner of VJ-2 Development I would say, yes, I do, because I'm responsible both as

a corporation and individually for everything that's there.

Q. How is the property titled? Who owns title to the [7] property?

A. VJ-2 Development and Don Jones.

Q. Jointly?

A. I think that's the way it is.

Q. Do you know or are you guessing?

A. I mean, my name has appeared on both of them. So, you know, I couldn't tell you exactly.

Q. Has anyone else ever had an interest in the property while you've owned it – while either you or VJ-2 have owned it?

A. No.

Q. Do you own property elsewhere?

A. No.

Q. Have you ever owned property elsewhere?

A. Yes.

Q. Where?

A. Salem.

Q. How many parcels?

A. Two or three.

Q. Did you develop those?

A. Yes.

Q. When did you develop those parcels?

A. Back in the '80s.

Q. Successful development?

A. I would think so.

[8] Q. Did you consider them successful?

A. Yes.

Q. Why are you suing the City?

A. Why am I suing the City?

Q. Right.

A. Because I think there's been a wrong that's been committed.

Q. What kind of wrong?

A. I think it's stated in the Complaint.

Q. Well, I want you to tell me.

A. Well, would you like to give me a copy of the complaint and I could probably read it to you? But I think that would give you all the different issues. And my attorney could probably explain it more in a lay term than I can.

Q. Well, who in the City did anything wrong, in your mind?

A. Well, I would assume that the City is an entity; my understanding. So whoever would be involved in the City from whatever standpoint.

Q. Can you identify any individual within the City government that you believe committed a wrong?

A. Whoever's responsible for the (pause) –

Q. Ordinance?

A. Yes.

[9] Q. Anyone else, other than whoever might have been responsible for the ordinance, that you believe committed a wrong?

A. I don't think so.

Q. And am I correct in understanding that the only wrong that you believe has been committed was the passage of the ordinance?

A. No.

Q. What other wrongs have been committed?

A. All of those that are included in the Complaint.

Q. Uh-huh. And in what way did the City commit a wrong in all the ways that you've alleged in your Complaint?

A. Well, I would – only thing I can say is in – the Complaint seems to set forth all of the aspects of it, where I consider a wrong has been committed.

Q. Well, you would –

A. Both state, local and federal.

Q. You would agree that the ordinance that was passed in – not really an ordinance, it was a charter

amendment, correct? Is that what you're talking about when you say "ordinance?"

A. Well, I think both would – it was a combination.

Q. And that required voter approval for annexation, correct?

[10] **A. Correct.**

Q. And every time that you've submitted your proposal since the passage of that amendment the voters rejected your proposal, correct?

A. That is correct.

Q. What information or evidence are you aware of to suggest that anybody from the City had anything to do with the voter rejection?

A. Well, it's my understanding from having worked for the government for quite a few years that the governmental entity is responsible for any regulations that it promulgates.

MR. MARTIN: Could you read that back, please.

(The reporter read the record.)

MR. MARTIN: And now would you mind rereading my question.

(The reporter read the record.)

BY MR. MARTIN:

Q. Can you answer that question, sir?

A. Huh?

Q. Can you answer my question?

A. I think I just did.

Q. Well, with all due respect, I don't think you did.

So I'm going to ask it again.

What information or evidence are you aware of [11] to suggest that anybody connected with the City had anything to do with the rejection of your proposal?

A. And again my answer would be, it's my understanding that – from having worked for governmental entities for years, that the governmental entity is responsible for any rules or regulation that passes.

Q. I'm going to ask it again.

A. Okay.

Q. What information or evidence are you aware of to suggest that any individual connected to the City had anything to do with the voter rejection?

A. And my answer again is, my experience working for the governmental agencies for years – that's my understanding, that the governmental agency's responsible for any rules, regulations, ordinances, charter amendments, what have you, that passes.

Q. So you're aware of no individual connected to the City that had anything to do with the voter rejections on your proposal, correct?

A. Well, I'm aware that all of those people were involved. A number of individuals were involved in passing that regulation. And so, in essence, yes.

Q. Who?

A. The mayor, the City Council, whoever was involved.

Q. What information do you have to suggest, in your [12] mind, that that amendment was passed to somehow harm you?

A. It has.

Q. It has?

A. Yes.

Q. Before it was passed, before it became the law there, do you have any information or evidence to suggest that it was proposed and passed for the reason of harming you?

A. No.

Q. Did you do anything to oppose the passage of that ordinance or charter amendment?

A. No.

Q. Did you do anything, on any occasion when you were proposing your annexation, to encourage the voters to approve your proposal?

A. Yes.

Q. What did you [illegible]

A. Provided quite a bit of information to them as to what the project was going to be. I had meetings with various groups, newspaper articles, radio, et cetera.

Q. Anything else?

A. That pretty much covers it, other than just common everyday word of mouth with individuals.

* * *

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF YAMHILL

EDWARD GORMLEY and CANDACE GORMLEY, husband and wife, Plaintiffs, vs. ALAN A. RUDEN, an individual, dba ALAN RUDEN CONSTRUCTION; JIM FISHER ROOFING, INC., an Oregon corporation; and RANDALL MILLER, an individual, dba MILLER MASONRY MAINTENANCE, Defendants.	Case No. CV 02 0286 AMENDED COMPLAINT (Breach of Contract, Negligence, Negligent Misrepresentation, Unlawful Trade Practices)

FIRST CLAIM FOR RELIEF
(Breach of Contract)

1.

On or about October 19, 1995, Plaintiffs and Defendant entered into a construction contract for the construction of Plaintiffs' personal residence at 1020 N.W. Baker Crest Court. A copy of the contract is attached hereto and incorporated herein by this reference as Exhibit 1.

2.

Plaintiffs are residents of Yamhill County, Oregon.

3.

Defendant Alan A. Ruden, dba Alan Ruden Construction ("Ruden") is an individual who does sustained business activities and has an office in Yamhill County, Oregon.

* * *

APPENDIX O

JOHN W. SHONKWILER, P.C.
John W. Shonkwiler, OSB #75337
13425 SW 72nd Ave.
Tigard, OR 97223
Telephone: (503) 624-0917

Of Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DON JONES and **VJ-2 DEVELOPMENT, Inc.,** an Oregon corporation, Plaintiffs, vs. **CITY OF MCMINNVILLE,** an Oregon municipal corporation, Defendant.	No. 04-CV-47-AA AFFIDAVIT OF DON JONES

STATE OF OREGON)
ss
COUNTY OF WASHINGTON)

I, DON JONES, being first duly sworn, hereby depose and say:

1. I am one of the plaintiffs in the above-entitled matter.

2. I make this affidavit in support of plaintiffs' Memorandum in opposition to Defendant's Motion for Summary Judgment.

3. The exhibits attached to this affidavit are true and correct copies of documents that were produced by Defendant City pursuant to discovery requests that I made to the City's officers and attorneys prior to and during this case.

4. I am over 18 years of age and I have personal knowledge of the facts set forth herein. I hereby verify, support and give testimony that all the allegations in the Complaint filed in the above-entitled matter are true, factual, accurate and occurred in the matter so stated, as I verily believe, including in particular:

A. At all material times Plaintiffs possessed an ownership interest in certain parcels of real property consisting of approximately 219 acres located west of the City of McMinnville, described starting in 1994 as Tax Lots 100, 105, 200, 202 and 300, Map R.4W., T.4 S. (the "Property"). The City of McMinnville ("Defendant") was and is an existing, duly incorporated and organized municipal corporation under the laws of the State of Oregon. Defendant was and is vested with the statutory authority to condemn real property or any part thereof and to regulate land uses, public facilities and services in order to carry out a public purpose otherwise authorized by statute.

B. At all material times, the Property consists of vacant parcels of land located adjacent to and outside the boundaries of the City of McMinnville. The Property is located wholly within the Defendant's adopted Urban Growth Boundary. The Property is zoned as Exclusive Farm Use 40-acre minimum (EFU-40) under Yamhill County ("County") land use regulations. It is designated as "Future Urbanizable" in accordance with the "McMinnville

Urban Growth Boundary Management Agreement" ("UGB Agreement"), entered into by the Defendant and the County. The Defendant has identified that the Property is needed for residential and commercial urbanization by the year 2000 to meet the requirements of the LCDC acknowledged Comprehensive Plan for Defendant. The UGB Agreement requires that the Property must first be annexed by Defendant before the Property can be designated and developed for residential urbanization.

C. Prior to Plaintiffs acquiring the Property, the Defendant included the Property within its Urban Growth Boundary and in 1981 extended water and sewer lines out to the property specifically designed to accommodate future urban development of the Property. In 1994, Plaintiffs conferred with Defendant's planning officials and other officials and Plaintiffs were informed that adequate public facilities and services were available to allow full urbanized development of the Property, that the Property was ready for immediate annexation and development, and based upon this information the Plaintiffs completed a contract to purchase the Property. Thereafter, Plaintiffs presented a master plan for development of the Property and proposed an annexation request to the Defendant. Plaintiffs also met with the general public concerning its proposed annexation and development plans. Subsequently, citizens of and near the Defendant obtained the Defendant's support to adopt a City Charter Amendment to prevent annexations without an approval vote of the Defendant's citizens. Prior to passage of the Defendant's Charter amendment to allow a citizen vote on annexations, Defendant wrongfully induced Plaintiffs into delaying filing Plaintiffs' annexation application to the Defendant.

On May 21, 1996, with the Defendant's support, the citizens of Defendant passed a City Charter amendment which requires that all annexations of lands to the Defendant must be voted upon by a majority of voters of the Defendant before the annexation request can become valid. The Defendant adopted the charter amendment by ordinance on November 12, 1996.

Plaintiffs desiring to annex and develop the Property, applied to the Defendant for annexation and obtained approval from the Defendant for annexation and development of the Plaintiffs' Property, subject to subsequent approval of the voters under the charter amendment. On or about November 4, 1997, the citizens of Defendant voted to deny the annexation.

Plaintiffs again applied to the Defendant for annexation and obtained approval from the Defendant for annexation and development of the Plaintiffs' Property, subject to subsequent approval of the voters under the charter amendment. On or about May 19, 1998, the citizens of Defendant again voted to deny the annexation.

Plaintiffs again applied to the Defendant for annexation and obtained approval from the Defendant for annexation and development of the Plaintiffs' Property, subject to subsequent approval of the voters under the charter amendment. On or about November of 1999, the citizens of Defendant again voted to deny the annexation.

Plaintiffs again applied to the Defendant for annexation and obtained approval from the Defendant for annexation and development of the Plaintiffs' Property, subject to subsequent approval of the voters under the charter amendment. On or about May 16, 2000, the citizens of Defendant again voted to deny the annexation.

D. At all material time, Plaintiffs' Property is located on the west side of the City and Plaintiffs have proposed development of their property at 6 units per acre with a variety of housing types that include multi-family units. Prior to Plaintiffs purchasing the Property and submitting each annexation and development application, the Plaintiffs relied upon the encouragement and assurances of the Defendant that the Property would be brought into the Defendant for development at urban densities. At all material time, the Property was not annexed and/or developed, directly leading to the Defendant's failure to achieve a continuous 5-year supply of buildable land planned and zoned for all needed housing types. At all material time, the Plaintiffs' Property satisfied all the requirements of the Defendant's Comprehensive Plan Policy 139.00 for extension of the Defendant's public facilities and services to Plaintiffs' Property.

E. On or about June 11, 2003, Plaintiffs applied to Defendant for authorization to extend the Defendant's public facilities and services (outside the Defendant's boundaries) to the Property and to modify the UGB Agreement (to allow extraterritorial extension of public facilities/services and land use approvals of the Property at urban densities). On July 8, 2003, at a regularly conducted Defendant Council meeting, the Defendant refused Plaintiffs' request for extension of Defendant's public facilities and services to the Property, and refused to allow urban development of the Property while it remained outside the Defendant's boundaries.

F. Defendant, by and through the authority of its citizens under the Defendant's Charter, have carried out a pattern and practice of having acted in bad faith, vexatiously, wantonly, for oppressive reasons or with reckless

disregard, and all in violation of societal norms, in injuring and interfering with the Plaintiffs' rights to due process, their other constitutionally protected rights, and deprived Plaintiff of its ability to use the property for an economic use without the Defendant having a compelling governmental interest to prevent or restrict such use. At all material time herein, Defendant has failed to comply with Defendant's Comprehensive Plan Policies 71.00, 71.05 and 139.00, and ORS 215.402, ORS 197.307, ORS 646.725 and ORS 646.730. Defendant's conduct has continued to interfere with plaintiffs' rights and the use and enjoyment of Plaintiffs' property continuously until the date of trial.

G. Defendant's actions have irreversibly and directly or proximately caused damage or loss to Plaintiffs in economic damages in the approximate sum of $38,670,600. The exact amount to be determined at trial. For permanent deprivation of said property, Plaintiffs shall irreversibly incur loss of fair market value for the land in the approximate sum of $13,311,400. The exact amount to be determined at trial. Defendant has intentionally and continuously failed to take actions that would have mitigated or otherwise reduced Plaintiffs' damages. A justiciable controversy exists between Plaintiffs and Defendant with respect to Defendant's actions and interpretations of said services agreement between the Defendant and the County as it relates to the Plaintiffs' Property.

5. I filed before May 21, 1996 an annexation application (ANX 10-96) to annex 179.4 acres of property into the Defending City. It was my intention that this annexation application would be reviewed and approved by the Defendant City as expeditiously as possible. The amendment to allow citizens to vote on annexations was passed on May 21, 1996. The Defendant City Council did not expedite or

otherwise review this application prior to May 21, 1996, and instead, continued the application's review indefinitely. As a result, this annexation application was not provided as an opportunity for final approval prior to May 21, 1996.

6. New matters that raise relevant facts that are material to the claims in Plaintiffs' Complaint have come to my attention through discovery of documents related to this litigation. Prior to obtaining these discovery documents, I was not aware of these new matters.

DATED: this 8 day of January, 2005.

/s/ Don Jones
DON JONES

Subscribed and sworn to before me this 8th day of January, 2005.

/s/ Lauri L. Shonkwiler
Notary Public for the
State of Oregon
My Commission
Expires: 10-30-07

[SEAL]
OFFICIAL SEAL
LAURIE L. SHONKWILER
NOTARY PUBLIC – OREGON
COMMISSION NO. 373560
MY COMMISSION EXPIRES
OCT. 30, 2007

BEST AVAILABLE COPY

Yamhill County
DEPARTMENT OF PLANNING AND DEVELOPMENT
401 NE EVANS STREET
• MCMINNVILLE, OREGON 97128
Phone: (503) 434-7516 • Fax: (503) 434-7544 •
Internet Address: http://www.co.yamhill.or.us/plan/

September 22, 2003

Alan Ruden
1341 NW Green View Court
McMinnville, Oregon 97128

Re: **Docket No. C-12-03, Tax Lot 4418-302**

Dear Mr. Ruden:

In reference to your application for conditional use approval to allow a short section of public road to cross property zoned for exclusive farm use, the planning staff has reviewed your application and finds that it complies with the requirements of the Yamhill County Zoning Ordinance. Your application has been approved with the following conditions:

1. The road location and design shall substantially conform to that shown on the application.

2. The access road shall be constructed to City of McMinnville local street standards. The applicant shall provide a letter from the City of McMinnville approving construction of the access road prior to its use.

This decision is based on findings and conclusions as contained in the staff report. This approval shall expire two years from the date of this letter unless construction has been initiated.

The Yamhill County Zoning Ordinance provides for appeal of any action or ruling of the Planning Director to the Board of Commissioners within fifteen (15) days of the decision on a proposed action. Anyone wishing to appeal the Director's decision must file an appeal form, together with a $250.00 fee, with this department no later than **5:00 p.m., October 7, 2003**. If no appeal is filed, the Director's decision will be final and this letter will serve as your official notice of approval of your application.

If you have any questions, please contact this office.

Sincerely,

/s/ Michael Brandt
Michael Brandt
Planning Director

cc: Board of Commissioners
Legal Counsel
Assessor
SPOs
City of McMinville

Yamhill County
DEPARTMENT OF PLANNING AND DEVELOPMENT
401 NE EVANS STREET
• MCMINNVILLE, OREGON 97128
Phone: (503) 434-7516 • Fax: (503) 434-7544 •
Internet Address: http://www.co.yamhill.or.us/plan/

NOTICE OF PENDING ADMINISTRATIVE ACTION

Notice is hereby given that the Director of the Yamhill County Department of Planning and Development has

received an application to approve the request described below. For further information, contact Martin Chroust-Masin at the Yamhill County Department of Planning and Development.

DOCKET NO.:	C-12-03
REQUEST:	Conditional use approval to allow 200-foot long and 15-foot wide section of city street to cross property zoned for exclusive farm use.
APPLICANT:	Alan A. Ruden
TAX LOT:	4418-302
LOCATION:	East of and abutting to North Hill Road and approximately 1000 feet north of the intersection of Wallace and North Hill Roads.
ZONE:	EF-80 Exclusive Farm Use and City of McMinnville UGB
REVIEW CRITERIA:	Section 403.04(N) and 1202.02 of the Yamhill County Zoning Ordinance; Oregon Revised Statute 215.296 and OAR 660-012-0065.

Interested parties are invited to review the application and make comments or suggestions regarding the proposed use. Provide comments in the following space, or attach additional sheets as necessary.

_____

_____

_____

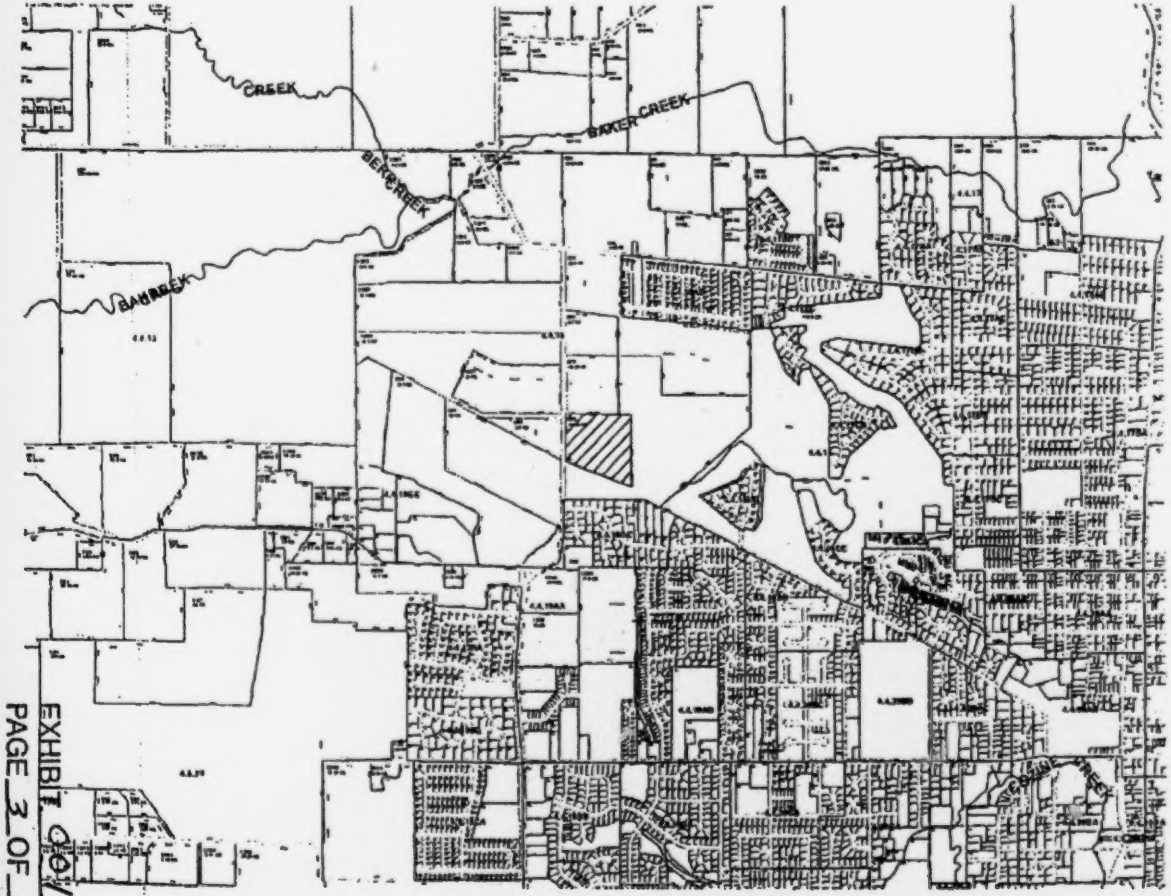
_____ Signature _____

Alternatively, you may request that the application be considered at a public hearing before the Planning Commission. A request for hearing must state the basis for the request and be accompanied by a $250.00 hearing fee. Dated August 15, 2003

COMMENTS OR REQUESTS FOR HEARING
MUST BE RECEIVED NO LATER THAN
5:00 p.m., September 1, 2003

NOTICE TO MORTGAGEE, LIENHOLDER, VENDOR, OR SELLERS ORS Chapter 215 requires that if you receive this notice, it must be promptly forwarded to the purchaser.

Yamhill County Scale Map



Legend

Vicinity

ER 67

EXHIBIT 201
PAGE 3 OF ___

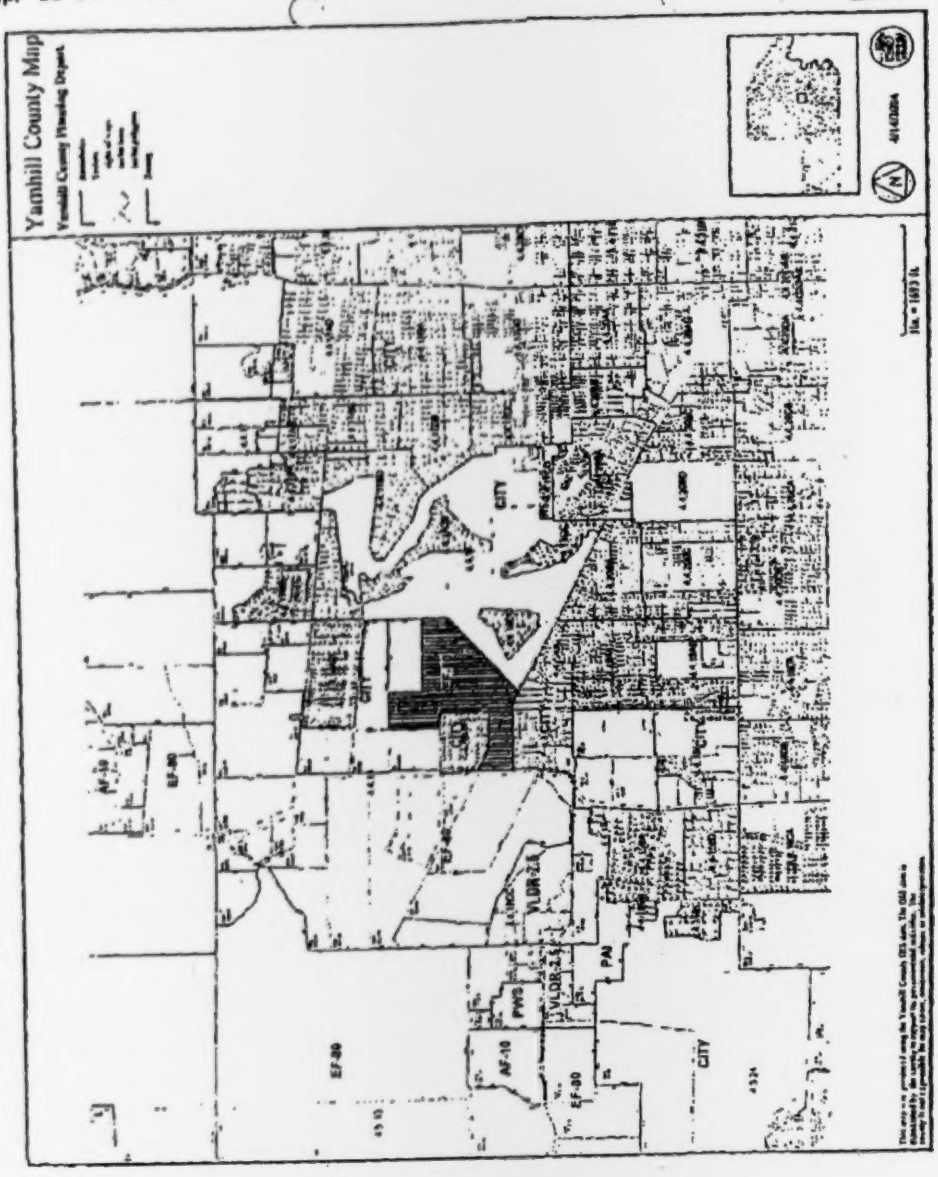


EXHIBIT 001
PAGE 4 OF ___

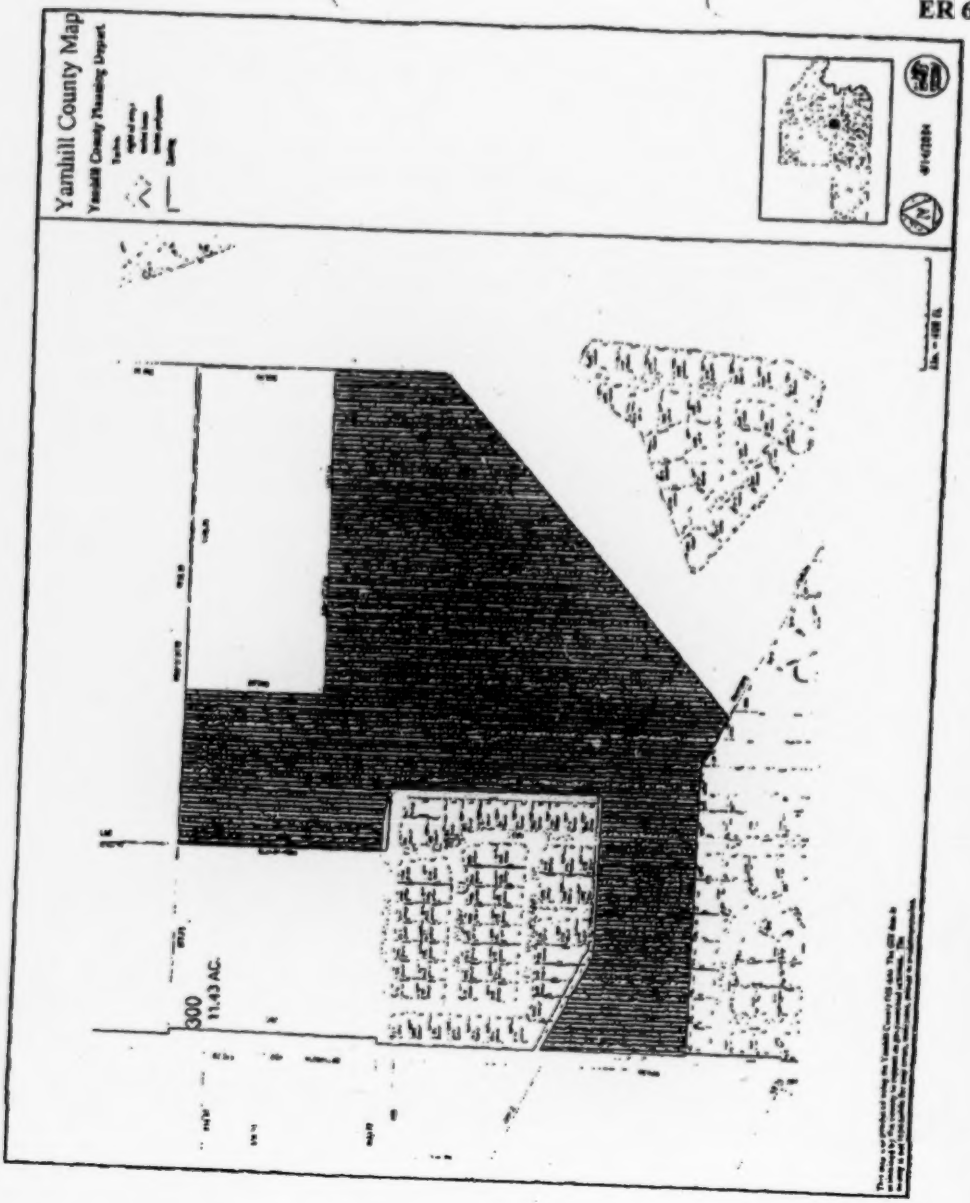


EXHIBIT 001
PAGE 5 OF

[Minutes of Annexation Meeting]

[City Council, June 29, 1995]

22 V-D & E ANNEXATION AND ZONE CHANGE SOUTH OF BAKER CREEK ROAD (ANX 3-95/2C 7-95): Senior Planner Montgomery reported that on May 25, 1995 the Planning Commission held a public hearing on a very complex request involving property in the vicinity of Hill Road and Baker Creek Road and that the request involved three different zone changes, an annexation and a two-phased subdivision, which were all unanimously approved. He noted, however, that subsequently the applicants' consultants developed a different plan for the property which is, in staff's opinion, superior to the plan approved by the Commission as it moves the commercial parcel to an internal section plus contains more open space. Because the new plan affects two of the zone changes and the second phase of the subdivision, Mr. Montgomery relayed that the original applications for those land use actions had been withdrawn by the applicants.

He advised that the Phase 1 portion of the subdivision is the same in both the development plan approved by the Commission and the new development plan which will be going before the Commission later this summer; therefore, the applicants are going forward with the requested rezoning that affects that portion of the property.

He also explained that the annexation proposal would need to be approved regardless of which plan is finally adopted

by the City and is therefore going forward at this time.

Due to the size and complexity of the project, Councilor Windle stated that the City Council needs to hold a public hearing on this issue. Mr. Montgomery answered that the Council only needs to address the two issues before it presently; however, the Council reached a consensus that it would like to see the total picture rather than committing to parts of it. Mr. Montgomery stated that a master plan would be brought before the Council showing the total project.

City Attorney Ross referencing section 17.78.050 of the Municipal Code explained that inasmuch as the decision to annex property consists of a quasi-judicial element and a legislative decision based upon the best judgment of the Council, the Council may deny an annexation based upon its legislative perception of the request even though the findings support and would allow annexation. Senior Planner Montgomery questioned the Council's ability to vote legislatively on the ordinance without calling for another public hearing. Councilor Payne stated that he is open to refunding the $450 fee for the annexation since the City Council would like to consider the annexation with regard to the total master plan for the entire build-out of the project.

Councilor Payne MOVED to deny the annexation as a legislative act separate and apart from the quasi-judicial decision,

even though the findings support the request, and to refund the $450 annexation fee to the applicant; SECONDED by Councilor Windle. Motion PASSED unanimously.

APPLICANT'S STATEMENT
(DON JONES and VJ-2 DEVELOPMENT, INC.)

I. Application for extraterritorial extension of City sewer services and utilities to Shadden Claim (R4W, T4S, Section 18, Tax Lot 100)

The Applicant requests extension of City of McMinnville sanitary sewer services to his property. The Applicant owns 78.0 acres of land (R4W, T4S, Section 18, Tax Lot 100) northwest of the City of McMinnville. The property directly abuts lands within the City limits, but the entire 78.0 acres is *outside* the City's boundaries. The entire 78.0 acres is also within the City's Urban Growth Boundary (UGB).

From 1996 through 2000, four annexation requests had been presented to the voters for approval of annexing this property into the City of McMinnville. All four annexation requests were denied by the voters. The City's Comprehensive Plan identifies the Applicant's property as being necessary to meet housing needs for the City prior to the year 2000. Comprehensive Plan Policy 71.01 requires the City to plan for 6 units per acre of residential densities in the UGB area west of the City (which includes the Applicant's property). Comprehensive Plan Policy 139.00 pertaining to sewer services provides that the City is authorized to extend or allow extension of sanitary sewerage collection. Comprehensive Plan Policy 140.00 allows

extension of sanitary sewer hookups outside the City limits, but within the City's Urban Growth Boundary. The applied for extension of sewer services (sanitary and storm) is necessary to allow the City to comply with LCDC state-wide planning goals and the City's acknowledged Comprehensive Plan.

City Ordinance 13.04.090 identifies that a land owner may make an application for a permit for building sewers and connections. The application is to the [sic] filed with and considered by the Director.

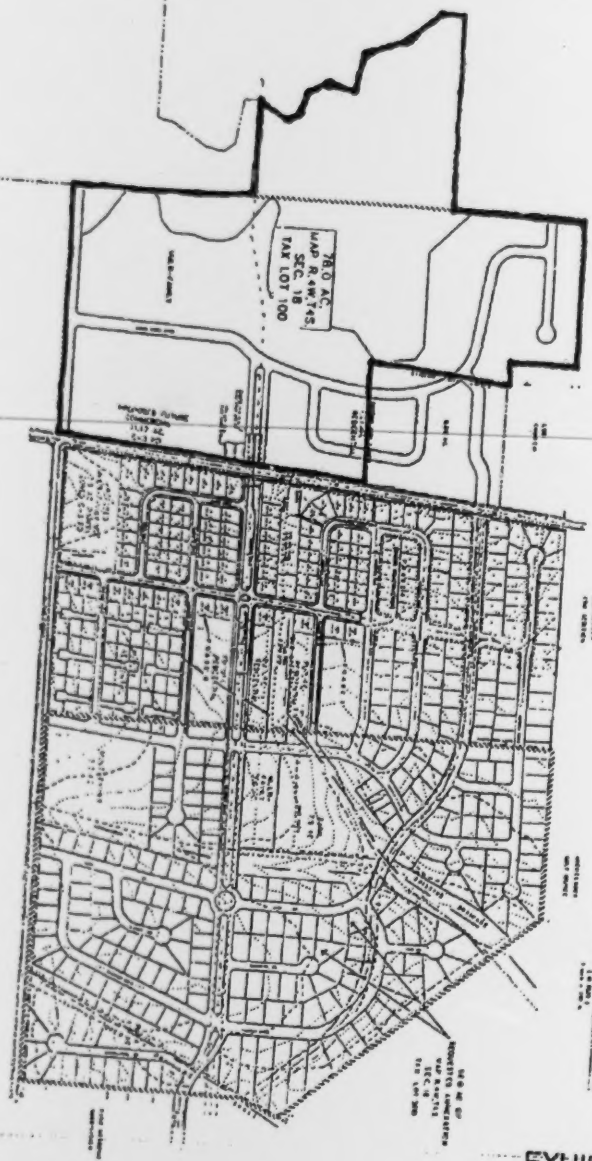
II. Application for an amendment to the McMinnville Urban Growth Boundary Management Agreement with Yamhill County

Separately, but in conjunction with the Applicant's request for a permit to extend City sanitary services to his 78.0 acre property northwest of the City of McMinnville, the Applicant is also requesting that the current McMinnville Urban Growth Boundary Management Agreement with Yamhill County be amended or modified. The Agreement needs to be modified to allow extension of City services into the UGB area and to allow the County to approve urban land uses when the development of the land is necessary to satisfy the LCDC acknowledged comprehensive plan of the City, but has not been annexed as a result of City voter disapproval of annexation.

The City Council of the City of McMinnville has the authority to modify this Agreement with Yamhill County. The proposed amendment or modification would allow the City to continue abiding by the City's charter amendment on annexation while complying with state land use regulations for providing adequate housing opportunities to meet

the UGB growth needs. The City and the County have independent authority to allow the City's extension of services into the UGB area and authorization of urban land uses, without violating the City's charter provision on annexation.

The Applicant's request to the City Council also provides for an alternative approach to land use permit review. This alternative would allow, if the City and the County prefer, the City to be delegated the planning review authority for the UGB area. Under this alternative, the City would extend urban services into the UGB area to service the Applicant's property and the County would allow land use permit review and approvals through the City's land use planning and building divisions. . . .



PLANNED DEVELOPMENT
MASTER PLAN

EXHIBIT 005
PAGE 4 OF

BEFORE THE CITY COUNCIL
OF THE
CITY OF MCMINNVILLE

REQUEST/APPLICATION of DON JONES and VJ-2 Development	**) FOR AMENDMENT TO) MCMINNVILLE URBAN) GROWTH BOUNDARY) MANAGEMENT AGREE-) MENT**

A. Name and Address of applicants:

Don Jones
VJ-2 Development, Inc.
695 Commercial Street SE, Suite 4
Salem, OR 97301
Telephone: (503) 362-8232

Legal Representative:
John W. Shonkwiler, P.C.
13425 SW 72nd Ave.
Tigard, OR 97223
Telephone: (503) 624-0917

B. Request/application for City Council Approval

Don Jones, hereinafter "Applicant," is requesting that the City Council adopt a resolution to seek the adoption of legislative changes to its existing agreement with Yamhill County, entitled: "McMinnville Urban Growth Boundary Management Agreement." The Applicant requests that the City Council and Yamhill County amend or modify this existing Agreement to include the following changes:

1. To allow extension of City services into the UGB area to serve the Applicant's property [78.0 acres of

land (R4W, T4S, Section 18, Tax Lot 100) northwest of the City of McMinnville].

2. To allow the County to approve urban land uses upon the Applicant's above described property. The City may wish to restrict this modification to allow the County to approve urban land uses when the development of the land is necessary to satisfy the LCDC acknowledged comprehensive plan of the City, but the land has not been annexed as a result of City voter disapproval of annexation.

C. Reasons for the request/application

The Applicant owns 78.0 acres of land (R4W, T4S, Section 18, Tax Lot 100) northwest of the City of McMinnville. The property directly abuts lands within the City limits, but the entire 78.0 acres is *outside* the City's boundaries. The entire 78.0 acres is also *within* the City's Urban Growth Boundary (UGB).

From 1996 through 2000, four annexation requests had been presented to the voters for approval of annexing this property into the City of McMinnville. All four annexation requests were denied by the voters. The City's Comprehensive Plan identifies the Applicant's property as being necessary to meet housing needs for the City prior to the year 2000. Comprehensive Plan Policy 71.01 requires the City to plan for 6 units per acre of residential densities in the UGB area west of the City (which includes the Applicant's property). Comprehensive Plan Policy 139.00 pertaining to sewer services provides that the City is authorized to extend or allow extension of sanitary sewerage collection. Comprehensive Plan Policy 140.00 allows extension of sanitary sewer hookups outside the City limits, but within the City's Urban Growth Boundary. The

Applicant is separately filing an application with the City pursuant to City Ordinance 13.04.090, for the Director's review, for approval of extension of these City services outside the existing City boundaries. This application for extension of sewer services (sanitary and storm) is necessary to allow the City to comply with LCDC state-wide planning goals and the City's acknowledged Comprehensive Plan.

Correspondingly, the Applicant is requesting that the current McMinnville Urban Growth Boundary Management Agreement with Yamhill County be amended or modified. The Agreement needs to be modified *to allow extension of City services into the UGB area and to allow the County to approve urban land uses* when the development of the land is necessary to satisfy the LCDC acknowledged comprehensive plan of the City, but has not been annexed as a result of City voter disapproval of annexation.

The City Council of the City of McMinnville has the authority to modify this Agreement with Yamhill County. The proposed amendment or modification would allow the City to continue abiding by the City's charter amendment on annexation while complying with state land use regulations for providing adequate housing opportunities to meet the UGB growth needs. The City and the County have independent authority to allow the City's extension of services into the UGB area and authorization of urban land uses, without violating the City's charter provision on annexation.

The Applicant's request to the City Council also provides for an alternative approach to land use permit review. This alternative would allow, if the City and the

County prefer, the City to be delegated the planning review authority for the UGB area. Under this alternative, the City would extend urban services into the UGB area to service the Applicant's property and the County would allow land use permit review and approvals through the City's land use planning and building divisions.

Respectfully submitted,
JOHN W. SHONKWILER, P.C.

/s/ John W. Shonkwiler
Attorney for Don Jones and VJ-2 Development

This 11th day of June, 2003

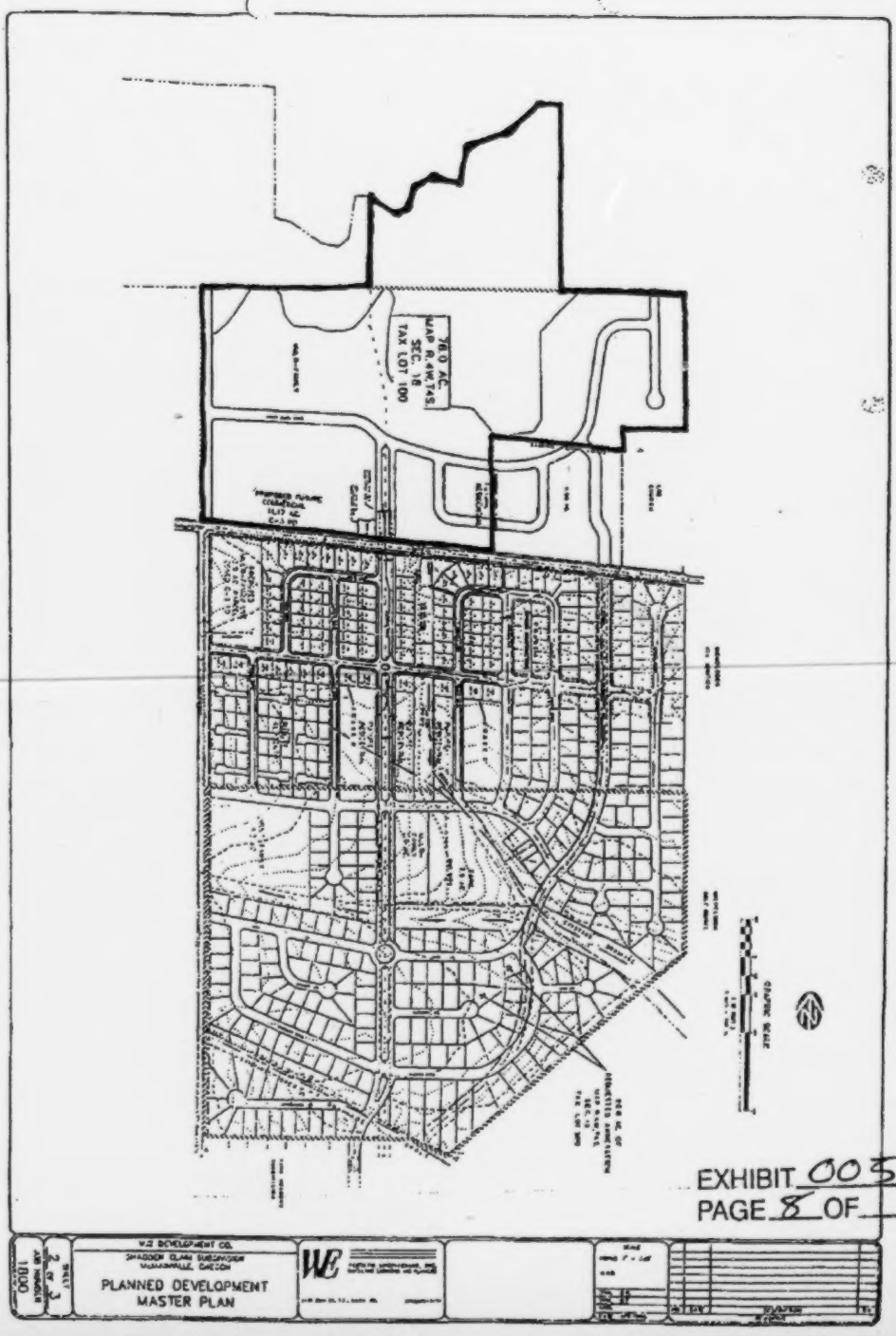


EXHIBIT 005
PAGE 8 OF

2. That a comprehensive wetland delineation (determination) of the site and adjacent lands owned by Dr. Collier needs to be conducted to assist in defining where development constraints might exist. Such a study has been completed by the school district for their property (this report found 1.1 acres of wetland within the southern portion of their property, and another .51 acres to the immediate southeast). Such a study is crucial in determining how the southern portion of the subject site can be developed (setbacks from the Star Mill ditch, and proposed street crossings). On a larger scale, it is important to have this information in place so that a comprehensive street and utility plan for the entire Collier and VJ-2 property can be planned. These issues will be revisited by staff as part of any subsequent proposal to rezone or subdivide the subject property, or other Collier-held property in this area.

3. The extreme northeastern corner of the subject site, at which is proposed the construction of a portion of a public street, is outside of the current and proposed city limits. As such, this street could not be constructed, leaving one of the proposed lots without public access.

4. The proposed alignment of Meadows Drive is in conflict with the existing Haun Drive alignment. Further, the placement of Meadows Drive is such that it separates the future elementary school site from the planned bicycle and pedestrian corridor. It would seem that this design invites greater risk to pedestrians traveling to and from the school than if the street were placed to the east of the bicycle and pedestrian corridor (BPA easement).

- Based on the concept plan submitted by the applicant, future development of the subject property would include the platting of approximately 61 single-family lots within the 14.5-acre site. The lots on which these homes would be constructed appear to range in size from 7,000 square feet to 9,000 square feet. Based on the provisions of plan policy 71.01 (maximum of six du/acre) and an assumption that all land within the proposed annexation is buildable, (14.5 acres), a maximum of 90 dwelling units could be permitted.

- The conceptual street system proposed to serve this parcel has been designed as a modified grid bounded by Hill Road on the west, and is bounded by a row of single-family lots on the east, with four local residential connecting streets (three oriented east-west and one north-south) and a local residential street stub proceeding south to the edge of the site. Vehicular access to the subdivision is proposed from Hill Road, until further development of surrounding areas would allow the completion of Meadows Drive. In February 2001, McMinnville School District #40 submitted an application (MP 10-01) on behalf of Dr. Emerson Collier to partition his land. Condition No. 6 stated, "That a no build strip, forty (40) feet in width and extending the length of the western edge of parcel 2, shall be designated on the face of the final plat. The purpose of this "no build" strip is to accommodate the future improvement of Hill Road to a minor arterial standard, consistent with the adopted Transportation Master Plan."

- At present, sufficient water service to the site can be provided by means of a 24-inch line, which exists in the Hill Road right-of-way adjacent to the site. A 16-inch diameter line extends through the midsection of the subject site in a north-south direction approximately 500 feet to the east of the subject site. If the applicant were to use this line to provide water

service to the subject site, then permission from the County to construct city services in unincorporated land would need to be granted. Also, a public utility easement would need to be granted to the applicant by Mr. Collier to allow a public utility to be constructed on private property. These lines will provide sufficient flow and volume to serve the proposed development. Police and fire services are already provided to this area.

- An eight-inch sanitary sewer line extends northward from the Park Meadows Subdivision, and also southward to a point near the northeast corner of the property. The sewer line is located approximately 75 feet northeast of the subject site. Permission from the County to construct city services in unincorporated land would need to be granted to the applicant. Also, a public utility easement would need to be granted to the applicant by Mr. Collier to allow a public utility to be constructed on private property.

To the east of the subject site, a distance of some 200 feet, is the Bonneville Power Administration's overhead transmission line that extends in a north-south direction from the Walnut City substation to the new substation constructed immediately north of Baker Creek Road. As the Commission is aware, a bicycle and pedestrian path is planned to be constructed within this corridor to provide connection to the neighborhoods through which it passes. When complete, this corridor would stretch from a man-made lake located north of Baker Creek Road to the south for a distance of nearly three miles, connecting residential and commercial areas within the Park Meadows subdivision, Barclay Heights development, Hillside Manor, Westvale, Jandina, James Addition subdivision, Ash Meadows, and Tall Oaks development. The subject site's close proximity to this pedestrian and bike corridor

would afford good alternative modes of travel to the future elementary school from surrounding neighborhoods.

- The applicant previously submitted an annexation (ANX 2-01) request and conceptual plan showing proposed residential development of a 24.74-acre site. This site, which included the property that is the subject of this current proposal, extended from the south of School District No. 40's property to the north of the Park Meadows subdivision. The annexation proposal was approved by the Planning Commission in December of 2001, and was considered by the City Council in January of 2002. However, that annexation request was not approved by the City Council due to the fact that its configuration created an "island" of unincorporated land, an action discouraged by the City. The current application is some 10-acres smaller in size and proposes a different internal street configuration. Most importantly, however, is that by removing some of the land included in the earlier application the current proposal does not create an island of unincorporated land. The distance between the northern boundary of the Park Meadows Subdivision and the southern boundary of the applicant's annexation request ranges from approximately 580 feet to 380 feet.

- There is no request to rezone the subject site from a County zone to a City zone at this time. The subject site, if annexed to the City, would therefore retain its present County zone designation of EF-80 (Exclusive Farm Use – 80-acre minimum) and not be allowed a building permit until such time that the zone is changed to a City designation.

- Some of the more obvious positive aspects of this development include: The provision of additional housing opportunities, which will be needed as the city continues to grow; extension of public infrastructure; increased tax base which would help pay for

existing and future infrastructure needs; and, protection of unique environments within the development as afforded by subsequent reviews and conditions of approval.

Negative effects, which may result from this development, include an increase in traffic from the relatively low level, which currently exists, impacts on school enrollment, and changes to the visual environment. Arguably, these are offset by the improvements to and construction of, streets to accommodate the proposed development, and plans by the School District to construct a new elementary school on property immediately north of the site.

City of McMinville

MEMORANDUM

DATE: December 2, 2002

TO: Doug Montgomery, Planning Director

FROM: Don Schut, Community Development Director /s/ DS

SUBJECT: Ruden Annexation ANX 3-02

I do not have any concerns relative to the proposed annexation. However, there are several issues relative to the proposed subdivision layout that I thought should be brought up early in this process.

The northerly east/west street is shown on parcels owned by two other parties. This may be an issue for construction of the street. In addition a portion of the east end of that street is outside the proposed and existing city limits.

Application states that the sanitary sewer is located at the NE corner of the proposed annexation. In reality it is not adjacent to the parcel and will require extension of sewers outside the city limits.

The proposed Meadows Drive alignment does not match the master plan. The northerly alignment does not work well with the Haun Drive stub street and the alignment also is shown on the school district parcel. My understanding from previous discussions was that the district was already concerned about the size of their parcel without taking right of way from at least two sides.

Secondary emergency access is not shown.

The proposed lot layouts do not show right of way widths. I would assume that the engineer has taken into consideration dedication of additional right of way on Hill Road and adequate flexibility in lot dimensions to address similar changes.

If the annexation is approved, we probably should require a master plan update to show how all transportation and utility services are proposed to serve the remainder of the site. Wetlands and current development patterns have already 'fixed' some of the changes for the owner and will need to be addressed in future projects. If we continue to use the existing master plan for the site planning we may not plan streets and utilities to serve all parcels.

City of McMinville
230 NE Second Street • McMinnville, Oregon 97128 •
www.ci.mcminnville.or.us

July 27, 2001

McMinnville School District #40
1500 NE Baker Street
McMinnville, OR 97128

RE: ANX 1-01

Dear Elaine:

This is to advise you that, at a meeting of the McMinnville City Council on Tuesday July 24, 2001 your application for annexation of a parcel of land approximately 12.0 acres in size was presented and carefully studied. The subject property is located east of Hill Road, south of Baker Creek Road, and north of the Park Meadows subdivision and is further described as a portion of Tax Lot 300, Section 18, T. 4 S., R. 4 W., W.M.

After careful consideration, the McMinnville City Council voted to *approve* ANX 1-01 and refer it to the voters. If no appeal is submitted to the Land Use Board of Appeals (LUBA) by August 14, 2001, the decision of the City Council will become final.

A copy of the ordinance adopted by the Council is enclosed for your files. If you have any questions or comments, please call me at (503) 434-7311.

Sincerely,

/s/ Doug Montgomery
Doug Montgomery, AICP
Planning Director

DRM:pja
Encl.

c: Jim Fenstermaker

City of McMinville

MEMORANDUM

DATE: May 11, 2001

TO: Doug Montgomery, Planning Director

FROM: Don Schut, Community Development Director

SUBJECT: ANX 1-01 School District/Collier

Public sanitary and storm sewer will not be available to this site without easements and extension of these services into the County. I do not believe these will be 'deal killer' problems, but they could delay any proposed project – it has not been an issue with the Shadden project extensions out of the City. It would be a lot cleaner from a sanitary sewer service view point if the annexation extended easterly a couple hundred feet to the location of the sewer.

I know that the plan is not binding, but we need to begin to lay some ground work for a proposed project. I have not compared this to the Shadden Claim lot layout, but somehow additional public roads will need to be built to serve the remaining property. If roads are not built adjacent to any of the other three sides of the school property, we will have lots backing onto the school grounds. Not that this is bad, but it will take some thought on providing access points for pedestrian as well as alternate vehicle traffic access points. I think a traffic plan will be in order when they come in for further approvals. The large lot on the side does not work at Grandhaven – the teachers are parking in front of the homes on Grandhaven and McDonald Streets. Also service and fire protection access points are not identified. Again, I realize this is a Grandhaven

building overlaid on the site, but I don't think it will fly as shown. My concern is that they will get into the planning without taking these things into consideration and not have enough lot to accomplish what they need. (Traffic, Parking, Pedestrian, Fire issues of the Columbus Building come to my mind when I see this layout.)

We will also need to restrict the number of driveways onto Hill Road and will need to require dedication of additional right of way.

CITY OF McMINVILLE
COMPREHENSIVE PLAN – VOLUME II

GOALS AND POLICIES

McMINVILLE COMPREHENSIVE PLAN

McMinnville's Comprehensive Plan has been divided into three interrelated volumes. Volume I, providing the background information, is both the narrative of and supporting documentation for the goals and policies developed by the community. It is a reference resource that can be used to interpret the intent of the goal and policy statements. Volume II contains the actual goal and policy statements. These statements are the culmination of the research, inventories, and projections of Volume I and reflect the directives expressed through the citizen involvement process in adopting the plan. All future land use decisions must conform to the applicable goals and policies of this volume. Volume III consists of the implementing ordinances and measures created to carry out the goals and policies of the plan. Principal among these are the comprehensive plan and zoning maps, the annexation,

zoning and land division ordinances, and the planned development overlays placed on areas of special significance.

VOLUME II GOALS AND POLICIES

Volume II, Goals and Policies, contains the goal, policy, and proposal statements which shall be applied to all land use decisions. Goal, policy and proposal statements each have different purposes: goal statements are the most general principles; policy statements are directed to specific areas to further define the goal statements; and proposals are possible courses of action open to the City which shall be examined to further implement the goal and policy requirements. Each of these statement types is further defined below:

> GOALS: are the broadly-based statements intended to set forth the general principles on which all future land use decisions will be made. Goals carry the full force of the authority of the City of McMinnville and are therefore mandated.
>
> POLICIES: are the more precise and limited statements intended to further define the goals. These statements also carry the full force of the authority of the City of McMinnville and are therefore mandated.
>
> PROPOSALS: are the possible courses of action available to the City to implement the goals and policies. These proposals are not mandated; however, examination of the proposals shall be undertaken in relation to all applicable land use requests.

The implementation of these goal, policy, and proposal statements shall occur in one of two ways. First, the specific goal, policy, or proposal shall be applied to a land use decision as a criterion for approval, denial, or modification of the proposed request. In this case the goal, the policy, or the proposal is directly applied. The second method for implementing these statements is through the application of provisions and regulations in ordinances and measures created to carry out the goals and policies. This method involves the indirect application of the statements. These ordinances and measures are included in Volume II of the McMinnville Comprehensive Plan.

* * *

CHAPTER II
NATURAL RESOURCES

GOAL II 1: TO PRESERVE THE QUALITY OF THE AIR, WATER AND LAND RESOURCES WITHIN THE PLANNING AREA.

LAND

Policies:

1.00 *Urbanizable lands outside the city limits, but inside the Urban Growth Boundary, shall be retained, whenever possible, in agricultural use until such time as they are needed for urban development.*

2.00 *The City of McMinnville shall continue to enforce appropriate development controls on lands with identified building constraints, including, but not limited to, excessive slope, limiting soil characteristics, and natural hazards.*

3.00 *The City of McMinnville shall review any identified mineral and aggregate resource locations to determine the quality of the material, the likelihood that it will be extracted and the compatibility of the site with surrounding land uses. The City shall seek to resolve any conflicts between aggregate resource locations and surrounding land uses, and shall protect, whenever possible, mineral and aggregate resources from future encroachment by incompatible uses, especially residential uses.*

4.00 *The City of McMinnville, in cooperation with the Oregon Department of Geologic and Mineral Industries, shall insure that aggregate sites are reclaimed after their usefulness has expired.*

AIR

5.00 *The quality of the air resources in McMinnville shall be measured by the standards established by the Oregon Environmental Quality Commission, and the Federal Environmental Protection Agency.*

6.00 *The City of McMinnville shall cooperate with the Oregon Department of Environmental Quality to insure that applications for air quality related permits are examined for compatibility with the City's comprehensive plan.*

* * *

CHAPTER V
HOUSING AND RESIDENTIAL DEVELOPMENT

GOAL V 1: TO PROMOTE DEVELOPMENT OF AFFORDABLE, QUALITY HOUSING FOR ALL CITY RESIDENTS.

General Policies:

58.00 *City land development ordinances shall provide opportunities for development of a variety of housing types and densities.*

59.00 *Opportunities for multiple-family and mobile home developments shall be provided in McMinnville to encourage lower-cost renter and owner-occupied housing. Such housing shall be located and developed according to the residential policies in this plan and the land development regulations of the City.*

60.00 *Attached single-family dwellings and common property ownership arrangements (condominiums) shall be allowed in McMinnville to encourage land-intensive, cost-effective, owner-occupied dwellings.*

61.00 *The City of McMinnville shall monitor the conversion of lands to residential use to insure that adequate opportunities for development of all housing types are assured. Annual reports on the housing development pattern shall be prepared for city review.*

Housing Rehabilitation Policies:

62.00 *The maintenance, rehabilitation and restoration of existing housing in residentially designated areas shall be encouraged to provide affordable housing.*

63.00 The utilization of federal and state loan and grant programs, as well as private sector financing, shall be encouraged to rehabilitate substandard housing.

Low-cost Housing Policies:

64.00 The City of McMinnville shall work in cooperation with other governmental agencies, including the Mid-Willamette Valley Council of Governments and the Yamhill County Housing Authority, and private groups to determine housing needs, provide better housing opportunities and improve housing conditions for low and moderate income families.

65.00 The City of McMinnville shall coordinate with the Mid-Willamette Valley Council of Governments to develop a "fair share" plan to allocate low-cost housing throughout the tri-county region.

66.00 The City of McMinnville shall continue to allow development of its fair share of the region's low-cost housing. The share accepted will be based on quantifiable studies which take into account the amount of the low-cost housing already in the community and the overall housing opportunities in the city and region.

67.00 Subsided [sic] *low cost housing shall be dispersed throughout the McMinnville urban area. Dispersal plans shall be coordinated with appropriate agencies.*

GOAL V 2: TO PROMOTE A RESIDENTIAL DEVELOPMENT PATTERN THAT IS LAND-INTENSIVE AND ENERGY-EFFICIENT, THAT PROVIDES FOR AN URBAN LEVEL OF PUBLIC AND PRIVATE SERVICES, AND THAT ALLOWS UNIQUE AND INNOVATIVE DEVELOPMENT TECHNIQUES TO BE EMPLOYED IN RESIDENTIAL DESIGNS.

Policies:

68.00 The City of McMinnville shall encourage a compact form of urban development by directing residential growth close to the city center and to those areas where urban services are already available before committing alternate areas to residential use.

69.00 The City of McMinnville shall explore the utilization of innovative land use regulatory ordinance which seek to integrate the functions of housing, commercial, and industrial developments into a compatible framework within the city.

70.00 The City of McMinnville shall continue to update zoning and subdivision ordinances to include innovative land development techniques and incentives that provide for a variety of housing types, densities, and price ranges that will adequately meet the present and future needs of the community.

71.00 The City shall designate specific lands inside the urban growth boundary as residential to meet future projected housing needs. Lands so designated may be developed for a variety of housing types. All residential zoning classifications shall be allowed in areas designated as residential on the Comprehensive Plan Map.

71.01 The City shall plan for development of the property located on the west side of the City to be limited to a density of six units per acre. It is recognized that it is an objective of the City to disperse multiple-family units throughout the community. In order to provide for multiple-family units on the west side, sewer density allowances or trade-offs shall be allowed and encouraged.

A. It will be the obligation of the City Planning Director and the City Engineer to determine whether or not the density of each proposed development can exceed six units per acre. School property, floodplain, and parklands will not be included in the density calculations.

B. For those developments which have less than six units per acre, the differences between the actual density of the development and the allowed density (six units per acre) may be used as an additional density allowance by other property which is located in the same immediate sewer service area, provided that no peak loading effect would occur which would cause overloading of particular line design capacity, and provided that the zone change application is processed under the provisions of Chapter 17.51 of the zoning ordinance.

C. The City will monitor development on the west side of McMinnville to determine which property is available for development at increased densities.

D. In no case will a residential development of a higher density than six units per acre be

approved if, by allowing the development, some other undeveloped property (which is not included in the application, but which is within the above-mentioned sewer service area) would be caused to develop at less than six units per acre because of lack of sewer capacity.

E. Applications for multiple-family zone changes will be considered in relation to the above factors, e.g., sewer line capacity and dispersal of units. In addition, requests for zone changes to multiple-family shall consider those factors set forth in Section 17.72.035 (zone change criteria) of the zoning ordinance. (as amended by Ord. 4218, Nov. 23, 1985)

71.05 The City of McMinnville shall encourage annexation and rezonings which are consistent with the policies of the comprehensive plan so as to achieve a continuous five-year supply of buildable land planned and zoned for all needed housing types. (as amended by Ord. No. 4243, Apr. 5, 1983)

Planned Development Policies:

72.00 Planned unit developments shall be encouraged as a favored form of residential development as long as social, economic and environmental savings will accrue to the residents of the development and the city.

73.00 Planned residential developments which offer a variety and mix of housing types and prices shall be encouraged.

74.00 Distinctive natural, topographic, and aesthetic features within planned developments shall be retained in all development designs.

* * *

EXHIBIT "A"
DOCKET ANX 3-95/ZC 6-95/ZC 7-95/ZC 8-95/S 5-95
FINDINGS OF FACT AND
CONCLUSIONARY FINDINGS

[May 25, 1995]

FINDINGS OF FACT

1. The applicants are requesting annexation of approximately 17.2 acres of land; a zone change from a County EF-40 (Exclusive Farm Use – 40-acre minimum) zone and City R-1 (Single-Family Residential) zone to a City R-1 PD (Single-family Residential Planned Development) zone on approximately 25 acres; a zone change from an R-1 (Single-Family Residential) zone to an R-4 PD (Multi-Family Residential Planned Development) zone on approximately 18.3 acres; and a zone change from an R-1 (Single Family Residential) zone to a C-3 PD (General Commercial Planned Development) zone on approximately 6.5 acres. Also requested is approval of a 99-lot subdivision tentative plan on approximately 59 acres. The subject property is located at the southeast corner of Hill Road and Baker Creek Road and described as Tax Lot 200 and a portion of Tax Lot 300, Section 18, T. 4 S., R. 4 W., W.M.

2. The site is currently zoned County EF-40 (Exclusive Farm Use – 40-acre minimum lot size), R-1 (Single-Family Residential), and C-3 PD (General Commercial Planned Development) and is designated as residential and commercial on the McMinnville Comprehensive Plan Map, 1980.

3. The annexation request was initiated by a consent petition of the property owners and meets the requirements as set forth in ORS 222.170.

4. Sanitary sewer and municipal water and power can serve the site. The municipal waste treatment plant has sufficient capacity to handle expected waste flows resulting from development of the property.

5. Northwest Natural Gas, GTE, TCI Cable Television, School District 40, and the McMinnville Fire Department have found no conflicts with their interests and all have recommended approval of the request.

6. Goals and policies from Volume II of the McMinnville Comprehensive Plan of 1981 which are applicable to this request are as listed in Attachments "A", "B", and "C", as prepared and submitted by the applicant.

7. The following sections of the McMinnville Annexation Ordinance (No.4357) are applicable to this report as decision making criteria:

   "Section 2. Conditions for annexation. The following conditions must be met prior to or concurrent with City processing of any annexation request:

   (a) The subject site must be located within the McMinnville Urban Growth Boundary.

   (b) The subject site must be contiguous to the existing city limits.

   Section 3. Policies. The following policies shall apply to all annexation requests.

   (a) The proposed use for the site complies with the McMinnville Comprehensive Plan, Volume II, Goals and Policies, and with the designation on the McMinnville Comprehensive Plan Map. If a redesignation of the plan map is requested concurrent with annexation, the uses allowed under the proposed designation must comply with Volume II, Goals and Policies.

(b) An adequate level of urban services must be available, or made available, within three years time of annexation. An adequate level of urban services shall be defined as:

(1) Municipal sanitary sewer and water service meeting the requirements enumerated in Volume II, Goals and Policies, for provision of these services.

(2) Roads with an adequate design capacity for the proposed use and projected future uses. Where construction of the road is not deemed necessary within the three year time period, the City shall note requirements such as dedication of right-of-way, waiver of remonstrance against assessment for road improvement costs, or participation in other traffic improvement costs, for application at the appropriate level of the planning process. The City shall also consider public costs for improvement and the ability of the City to provide for those costs.

8. The following sections of the McMinnville Zoning Ordinance (No. 3380) are applicable to the request:

General Provisions:

* * *

housing; (2) unnecessarily decrease densities; or (3) allow special conditions to be attached which would have the effect of discouraging needed housing through unreasonable cost or delay."

CONCLUSIONARY FINDINGS FOR APPROVAL:

1. The subject request complies with goals and policies of the McMinnville Comprehensive Plan, 1981 (Finding of Fact No. 6) as listed in the applicant's submitted findings, identified as Attachments "A", "B", and "C".

2. The criteria listed in Ordinance No. 4357 (Annexation Ordinance) (Finding of Fact No. 7) are satisfied by the request as follows:

   (a) The request conforms to Section 2 in that the site is located within the McMinnville Urban Growth Boundary, and it is contiguous to the existing city limits.

   (b) The request conforms with Policy 3(b) for the reasons stated in Conclusionary Finding for Approval No. 1 above. The site is designated for residential use and commercial use on the City Comprehensive Plan Map.

   (c) Policy 3(b)(1) is satisfied by the request in that new water and sewer service can be provided to the subject site soon after annexation.

   (d) Policy 3(b)(2) is satisfied since additional right-of-way and street improvements will be required during the subdivision process.

3. The subject request complies with the applicable requirements of the McMinnville Zoning Ordinance (Finding of Fact No. 8) as follows:

   (a) Section 17.03.020 is satisfied by the request for the reasons enumerated in Conclusionary Finding for Approval No. 1.

   (b) The applicable sections of Section 17.51.030 are also satisfied by the requ t as follows:

(1) There are special conditions and objectives which warrant a departure from the standard regulation requirements, including the need to condition the future development of the multi-family and commercial lots, and permit

* * *

EXHIBIT "A"
DOCKET ANX 10-96
FINDINGS OF FACT AND
CONCLUSIONARY FINDINGS

[June 20, 1996]

FINDINGS OF FACT

1. The applicants are requesting annexation of two parcels of land totaling approximately 179.4 acres.

   The subject property is located at the southeast corner of Hill Road and Baker Creek Road and described as Tax Lot 200 and a portion of Tax Lot 300, Section 18, T. 4 S., R. 4 W., W.M.

2. The site is currently zoned County EF-40 (Exclusive Farm Use – 40-acre minimum lot size) and is designated as residential on the McMinnville Comprehensive Plan Map, 1980.

3. The annexation request was initiated by a consent petition of the property owners and meets the requirements as set forth in ORS 222.170. Final approval of this request is subject to approval by the electorate at an election to be held in November, 1996.

4. Sanitary sewer and municipal water and power can serve the site. The municipal waste treatment plant

has sufficient capacity to handle expected waste flows resulting from development of the property.

5. Northwest Natural Gas, GTE, TCI Cable Television, School District 40, and the McMinnville Fire Department have found no conflicts with their interests and all have recommended approval of the request.

6. Goals and policies from Volume II of the McMinnville Comprehensive Plan of 1981 which are applicable to this request are as listed in Attachments "A", "B", and "C", as prepared and submitted by the applicant.

7. The following sections of the McMinnville Annexation Ordinance (No.4357) are applicable to this report as decision making criteria:

   "Section 2. *Conditions for annexation.* The following conditions must be met prior to or concurrent with City processing of any annexation request:

   a. The subject site must be located within the McMinnville Urban Growth Boundary.

   b. The subject site must be contiguous to the existing city limits.

   Section 3. *Policies.* The following policies shall apply to all annexation requests.

   a. The proposed use for the site complies with the McMinnville Comprehensive Plan, Volume II, Goals and Policies, and with the designation on the McMinnville Comprehensive Plan Map. If a redesignation of the plan map is requested concurrent with annexation, the uses allowed under the proposed designation must comply with Volume II, Goals and Policies.

   b. An adequate level of urban services must be available, or made available, within three years

time of annexation. An adequate level of urban services shall be defined as:

(1) Municipal sanitary sewer and water service meeting the requirements enumerated in Volume II, Goals and Policies, for provision of these services.

(2) Roads with an adequate design capacity for the proposed use and projected future uses. Where construction of the road is not deemed necessary within the three year time period, the City shall note requirements such as dedication of right-of-way, waiver of remonstrance against assessment for road improvement costs, or participation in other traffic improvement costs, for application at the appropriate level of the planning process. The City shall also consider public costs for improvement and the ability of the City to provide for those costs.

CONCLUSIONARY FINDINGS FOR APPROVAL:

1. The subject request complies with goals and policies of the McMinnville Comprehensive Plan, 1981 (Finding of Fact No. 6) as listed in the applicant's submitted findings, identified as Attachments "A", "B", and "C".

2. The criteria listed in Ordinance No. 4357 (Annexation Ordinance) (Finding of Fact No. 7) are satisfied by the request as follows:

   (a) The request conforms to Section 2 in that the site is located within the McMinnville Urban Growth Boundary, and it is contiguous to the existing city limits.

(b) The request conforms with Policy 3(b) for the reasons stated in Conclusionary Finding for Approval No. 1 above. The site is designated for residential use and commercial use on the City Comprehensive Plan Map.

(c) Policy 3(b)(1) is satisfied by the request in that new water and sewer service can be provided to the subject site soon after annexation.

(d) Policy 3(b)(2) is satisfied since additional right-of-way and street improvements will be required during the subdivision process.

3. The subject request complies with the applicable requirements of the McMinnville zoning Ordinance (Finding of Fact No. 8) as follows:

(a) Section 17.03.020 is satisfied by the request for the reasons enumerated in Conclusionary Finding for Approval No. 1.

(b) The applicable sections of Section 17.51.030 are also satisfied by the request as follows:

(1) There are special conditions and objectives which warrant a departure from the standard regulation requirements, including the need to condition the future development of the multi-family and commercial lots, and permit additional residential density than that which would be permitted under the provisions of the R-1 zone standards.

(2) As noted in the conclusionary findings for approval, the proposed development will be consistent with the comprehensive plan objectives for the area.

(3) Adequate access and services will be provided to the proposed development through the construction of streets and sidewalks.

(4) The project, if approved, is expected to be completed within the next two years. This is a reasonable period of time to complete a project of this scale.

(5) As noted in the conclusionary findings for approval, the existing and planned streets are adequate to support the anticipated traffic.

(6) Utility facilities presently serving the area are adequate to serve the proposed development of the subject site.

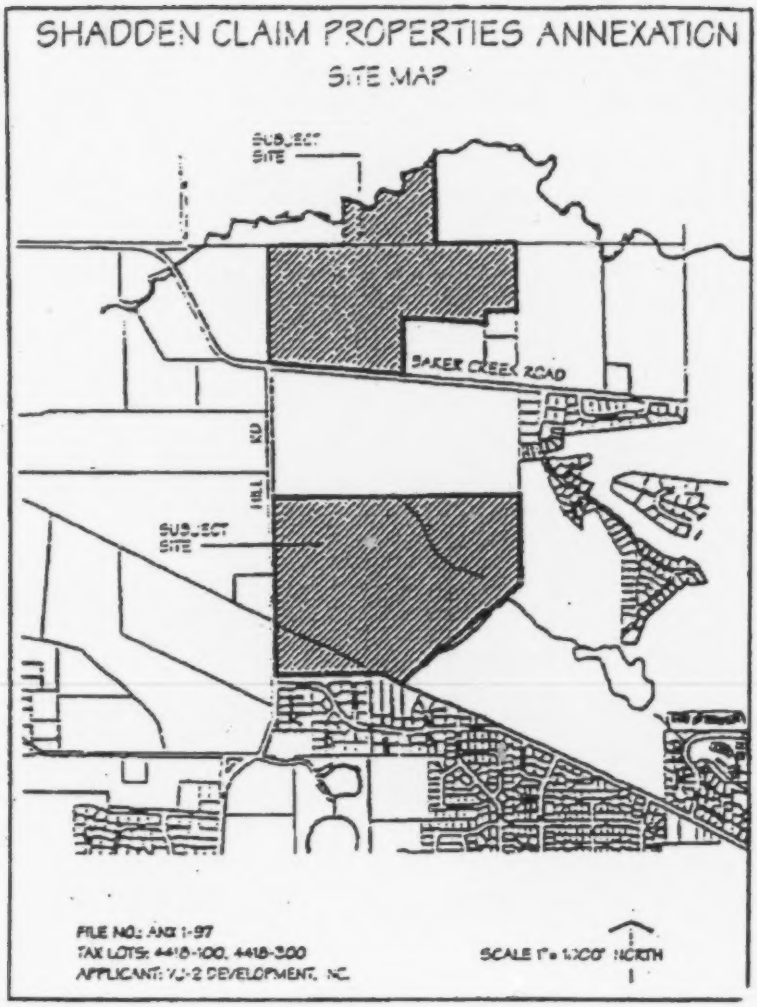
[LOGO] Published by the
City of McMinnville

ANNEXATION ELECTION
SHADDEN CLAIM PROPERTY

GENERAL INFORMATION:

The McMinnville City Charter requires that all annexations, except those otherwise mandated by state law, be referred to a vote of the electorate following public hearing. Public hearings concerning annexation of the Shadden Claim property were held on June 19, 1997 and July 22, 1997. Based on the public testimony, and findings of these hearings, the City Council found that this annexation request is consistent with the policies of the McMinnville Comprehensive Plan and other City and State policies and standards, and that it should be referred to the electorate. The voters of McMinnville will vote on the proposed

annexation of the Shadden Claim property on November 4, 1997. In accordance with the McMinnville Annexation Ordinance, the City is required to publish this information in the local newspaper. It has been prepared by City staff and includes factual data and conclusions which the Council used in deciding to schedule the annexation for election.


SHADDEN CLAIM PROPERTIES ANNEXATION
SITE MAP
SUBJECT SITE
BAKER CREEK ROAD
HILL RD
SUBJECT SITE
FILE NO.: ANX 1-97
TAX LOTS: 4418-100, 4418-300
APPLICANT: VJ-2 DEVELOPMENT, INC.
SCALE 1" = 1000'
NORTH

SHADDEN CLAIM PROPOSAL:

The subject property consists of two parcels of land totaling approximately 171.6 acres. The parcels are generally located north of Baker Creek Road and south of Baker Creek, and north of the Park Meadows subdivision, south of Baker Creek Road, and east of Hill Road. These properties are within the McMinnville Urban Growth Boundary and are part of a planned development referred to as Shadden Claim. The eventual need to annex and develop this land was identified in 1981 when the McMinnville Urban Growth Boundary was established. The general land use plan for the Shadden Claim properties proposes the development over time of from 341 to 624 single-family dwelling units, 168 to 280 multiple-family dwelling units, 11 acres of commercial, and 28 to 43 acres of public park land. On-site water, sewer, street, and drainage system improvements would be the responsibility of the developer. Safety and emergency services would be provided by the City. Transportation, sanitary sewer, and park system development fees would be paid to the City when each new housing unit or commercial structure is built.

ADDITIONAL DEVELOPMENT REQUIREMENTS:

Approval of this annexation does not authorize development of these properties. If the requested annexation is approved, the developer will be required to submit specific development plans to the Planning Commission and City Council for review at future public hearings. Approval of these development plans require compliance with the McMinnville Zoning Ordinance, Land Division Ordinance, and other applicable City and State regulations in effect at the time.

FURTHER INFORMATION:

This is a vote-by-mail ballot which must be received by the Yamhill County Clerk no later than Tuesday, November 4, 1997. For additional information please call the McMinnville Planning Department at 434-7311.

[Annexation Report]

* * *

state funds that a school district will receive is the size of enrollment. In essence, the more families with children in the schools the greater the potential for a larger amount of state funds to support the schools. Therefore, even the increase in the number of school children created by this development will have a more positive than negative impact on the needs of the school system.

(5) ELIMINATION OF FARM LAND: The issue here is that no farm land should be allowed to be used for development.

Shadden Claim Development consists of approximately 249.6 acres of land. 78 acres (approximately one-third) of the development is currently within the city limits. It is located in the center one-third of the proposed development. The other two-thirds, approximately one-third to the north and approximately one-third to the south of the 78 acre parcel, are being requested for annexation. The south parcel is bounded on three sides by development. Over one-third of the north parcel is unusable as farm land.

During the last few years, farming all of the usuable portions of the development site (including the 78 acre parcel) proved to be unprofitable according to a local farmer who was leasing the land. Therefore, I would venture to guess that the land remaining after

the 78 acre center parcel is developed will not be reasonably usable or viable as farm land.

(6) AMOUNT OF LAND BEING ANNEXED: The person who raised this issue suggested that the proposed annexation request was to [sic] large and that a smaller request would have a better chance of gaining voter approval.

I thoroughly considered the advantages of submitting a smaller amount of land for annexation. However, I finally decided against this for two reasons. First, I believe the voters in this city are intelligent and knowledgeable individuals. As stated earlier, the conceptual master plan for this development was known to the voters long before there was a rumor of the annexation initiative. Therefore, the voters already know how much land I really want them to consider annexing to the city. So, why play political games. Submitting a smaller amount would have been, if not outright dishonest, at the very least misleading and deceitful. I refuse to behave in such a manner. Second, If you look at the overall master plan for the development, it is rather evident that the current annexation request is the most reasonable. An elimination of either of the parcels being requested for annexation would greatly diminish the value of the development's contribution to the overall needs/wants of the community and quality of life in the community.

The south parcel is necessary to provide the Meadow[s] Drive connection creating the long desired alternative north-south route. The north parcel provides a long desired neighborhood commercial area. Both parcels provide a long desired major connection of the city's parks and bike/walk trail system. They add a considerable

* * *

DOCKET ANX 1-97 June 19, 1997

Request: Annexation of two parcels of land totaling approximately 171.6 acres.

Location: Parcel one is located north of Baker Creek Road, and south of Baker Creek and is further described as a portion of Tax Lot 100, Section 18, T. 4 S., R. 4 W., W.M. Parcel two is located east of Hill road, south of Baker Creek Road, and north of the Park Meadows subdivision and is further described as a portion of Tax Lot 300, section 18, T. 4 S., R. 4 W., W.M.

Applicant: VJ-2 Development Corporation

EXHIBITS

1. Staff Report
2. ANX 1-97 Application and Fact Sheets
3. Conceptual master plan for subject sites submitted by applicant
4. List of property owners to whom notice was sent
5. Affidavit of Publication
6. Referrals
7. Vicinity Sketch
[8. Letter From Mark Davis. Dated June 12, 1997]

SUBJECT SITE

The subject request involves two separate parcels of land. Parcel one (southern parcel) totals approximately 93.4 acres of land which has been used historically for agricultural purposes. There are presently no structures located within this parcel and topographically it is relatively flat, dropping slightly in elevation from the north to the south and southeast. A natural drainage channel crosses through the northeast corner of the parcel, running in a northwest-southeast direction; a portion of the Newby mill race (the

ditch that carried water to the Newby grist mill in lower City Park) extends across the extreme southwest corner of the parcel. Vegetation within the parcel consists primarily of grass with heavy stands of ash, maple, and alder in areas of the site which appear to have wetland characteristics (located along the south and southeast border of the parcel). To the immediate south of the parcel is the Park Meadows development zoned R-1 PD. To the north is the Shadden Claim development which is also zoned R-1 PD. To the east is the Michelbook golf course (zoned R-1 PD), and to the west across Hill Road. is farm land and two residences (land is zoned EF-40).

Parcel two (northern parcel) totals some 78.2 acres of land which has also been used historically for agricultural purposes. The only physical development within the site consists of an older home and outbuildings located in the extreme southeast corner of the parcel. Topographically

* * *

EXHIBIT "A"
DOCKET ANX 1-97
FINDINGS OF FACT AND
CONCLUSIONARY FINDINGS

[June 19, 1997]

FINDINGS OF FACT

1. The applicant requests annexation of two parcels of land totaling approximately 171.6 acres. Parcel one is located north of Baker Creek Road, and south of Baker Creek and is further described as a portion of Tax Lot 100, Section 18, T. 4 S., R. 4 W., W.M. Parcel two is located east of Hill Road, south of Baker Creek

Road, and north of the Park Meadows subdivision and is further described as a portion of Tax Lot 300, Section 18, T. 4 S., R. 4 W., W.M.

2. The subject sites are currently zoned County EF-40 (Exclusive Farm Use – 40-acre minimum) and designated as Residential and Commercial (some 11 acres of the northern parcel), at the northeast corner of Hill Road and Baker Creek Road) on the City of McMinnville Comprehensive Plan Map, 1980.

3. The request was initiated by a consent petition of the property owners and meets the requirements as set forth in ORS 222.170. The request is subject to a vote of the electorate pursuant to the requirements of the City's annexation ordinance.

4. Sanitary sewer and municipal water and power can serve the site. The municipal waste treatment plant has sufficient capacity to accommodate expected waste flows resulting from future development of the property.

5. The City of McMinnville Engineering and Building Departments, McMinnville City Manager and City Attorney, McMinnville School District Number 40, McMinnville Water and Light, McMinnville Fire Department, and the Yamhill County Planning Department have reviewed this request and have found no conflicts with their interests.

6. Goals and policies from Volume II of the McMinnville Comprehensive Plan of 1981 which are applicable to this request include:

Chapter II Natural Resources

1.00 Urbanizable lands outside the city limits, but inside the Urban Growth Boundary, shall be retained, whenever possible, in agricultural use until such time as they are needed for urban development.

Chanter IV Economy of McMinnville

* * *

McMinnville as the commercial center of Yamhill County providing employment opportunities, goods, and services for the City and County residents.

(d) *Policies 23.00 and 24.00* are satisfied by the request as this application includes a conceptual plan identifying the placement of some eleven acres of commercial development at the northeast corner of the intersection of Hill Road and Baker Creek Road. Additional commercial land is proposed adjacent to the manmade lake. Due to the shape of the areas intended to be utilized for future commercial development, characteristic strip development is not possible. Other uses proposed for this site, to include public park land and residential development, would be integrated with the planned commercial areas, in compliance with these policies.

(e) *Goal V-1 and V-2 and Policy 68.00* are satisfied by the request as this application would make possible additional housing stock to be added to the City; upon development approval, the application of the Uniform Building Code guarantees the quality of the housing; an urban level of services can be made available to adequately serve future development on the site; and the subject site is located within the urban growth boundary adjacent to recent single-family residential development thereby promoting a compact urban form.

(f) *Policies 58.00, 71.00 and 71.05* are satisfied by the request in that the residential comprehensive plan designation, which is carried by the subject

site, allows for development of a variety of housing types and densities within the City. Approval of this request would add additional building land to the City's inventory which could be developed for housing, and in particular, multi-family housing.

The City's acknowledged average annual growth rate of 3.1 percent, when applied to the current certified population figure of 22,880, results in a projection of an additional 3,773 residents which will be added to McMinnville's population over the next five years. At 2.5 persons per household and 5 dwelling units per acre, some 302 vacant developable acres planned and zoned for residential development are necessary to meet residential land use needs over the next five year period (June 1997 through June 2002).

Currently, there are approximately 130 acres of vacant, buildable residential land within the city limits. This leaves a deficit of approximately 172 residential acres which are needed to meet the projected five-year need. Some 112 to 127 acres of land which is the subject of this application is proposed for residential development. Utilization of the higher of the two figures still leaves the city with a five-year residential land deficit of some 45 acres.

* * *

adequate storm water drainage system will be designed to specifications as determined by the City Engineering Department. On-site storm water retention facilities shall be addressed where determined to be necessary. The City shall continue to coordinate with the City Water and Light Department in the land use decision making process.

(l) *Policy 155.00* is satisfied since the annexation of the site will not overburden existing police and fire service facilities. In addition, a new fire district substation would be constructed within the subject sites thereby enhancing public safety and welfare through a reduction in emergency response times and other benefits.

(m) *Goal IX 1* is satisfied since the property is within the McMinnville Urban Growth Boundary and all urban services are available or can be made available to the site. As previously noted regarding Finding of Fact 1(b), inclusion of this land into the city limits of McMinnville will assist in meeting projected residential land use needs. The orderliness of this application's request is further demonstrated in that the subject sites have been identified for future urban development since their inclusion into the urban growth boundary (UGB) in 1981. The lands have been deemed necessary by the City of McMinnville for urban development by their location within the present urban growth boundary.

2. The criteria listed in *Ordinance No. 4636* (Annexation Ordinance) (Finding of Fact No. 7) are satisfied by the request as follows:

(a) The request conforms to *Section 2(a) and (b)* in that the site is located within the McMinnville Urban Growth Boundary and it is contiguous to the existing city limits.

(b) The request conforms with *Policy 3(a)* for the reasons stated in Conclusionary Finding for Approval No. 1, above. The site is designated for residential use on the McMinnville Comprehensive Plan Map.

(c) *Policy 3(b)(1)* is satisfied in that water and sanitary sewer facilities are currently available to serve the site and would be extended to the site boundary at the time of development. Additionally:

1. Sanitary sewer

   a. The City of McMinnville's wastewater treatment plant was designed to handle the sewage generated from these two parcels requested for annexation as they lie within the service boundary of the new treatment plant.

   b. The new Cozine trunk sewer and pump station improvements are scheduled for completion by the end of 1997, which is well ahead of the development timeline of these two parcels proposed for annexation. The two parcels are within the service boundary of the new trunk sewer and pump station.

   c. Local sanitary sewer collection lines are proposed to be constructed to City standards as development to urban densities occurs.

2. Storm Drainage

   a. Parcel one drains into the Cozine Creek Basin. The applicant is required by the City to provide stormwater detention on this parcel to minimize impacts on the capacity of the downstream Cozine Basin due to increased stormwater runoff from improved surfaces.

b. Parcel two drains north to Baker Creek. Stormwater detention is not required for this drainage basin.

3. Water

a. A public 16 inch diameter transmission waterline which extends in a south-north direction through the midsection of parcel one was constructed in the 1980's by McMinnville Water and Light. This line is more than adequate to provide the minimum fire flows for the proposed residential development on this site.

b. A public 24 inch diameter transmission waterline was constructed in 1996 from the reservoir on Fox Ridge Road along Hill Road and Baker Creek Road frontage to better serve the northwest part of McMinnville. This line will intertie with main distribution lines for parcels one and two and will provide adequate fire flows for the residential, multi-family, and commercial development proposed for the Shadden Claim Planned Development.

(d) Policy 3(b)(2) and Policy 3(c) shall be satisfied since additional right-of-way and street improvements will be required as necessary as conditions of approval for any future requested land use action. In addition:

1. Streets

a. Arterial roadways, Baker Creek Road and Hill Road, provide access to the site. As arterial roadways, and based on

existing traffic counts and projected trips generated by this development, these streets have adequate capacity to handle the traffic from the two parcels requested for annexation.

b. The applicant is required to make frontage street improvements to Baker Creek Road and Hill Road as the Shadden Claim Planned Development proceeds and approvals are granted by the City.

c. An internal public street network (modified grid pattern) is proposed within the subject site. These streets will be constructed to City standards.

The police and fire departments and school district had no objections to this annexation request.

3. The subject request complies with the applicable requirements of the McMinnville Zoning Ordinance (Finding of Fact No. 8) as follows:

(a) *Section 17.03.020* is satisfied by the request for the reasons enumerated in Conclusionary Finding for Approval No. 1.

DRM:ral

City of McMinnville
230 NE Second Street • McMinnville, Oregon 97128 •
www.ci.mcminnville.or.us

February 23, 1998

Don Jones
VJ2 Development Corporation
695 Commercial Street SE Suite 4
Salem OR 97301

Dear Mr. Jones:

This is to advise you that at a meeting of the McMinnville City Council on Tuesday, February 17, 1998, your application for annexation (ANX 3-97) of a parcel of land totaling approximately 78.2 acres located north of Baker Creek Road, and south of Baker Creek and further described as a portion of Tax Lot 100, Section 18, T. 4 S., R. 4 W., W.M., was presented and carefully studied.

Based on its legislative percention [sic] of the request as detailed in the record of the February 17, 1998 hearing, the City Council voted to *deny* ANX 3-97.

Pursuant to the zoning ordinance of the City of McMinnville, an application denied by the City Council may be appealed within 21 days of such denial to the Land Use Board of Appeals (LUBA). If no appeal is filed on or before March 10, 1998, the decision of the City Council will be final.

If you have any questions on this matter, please contact me at 434-7311.

Sincerely,

/s/ Doug Montgomery
Doug Montgomery, AICP
Planning Director

DRM:ral

c: Alan Baker
Jeff Kizer
Bob deForest
Mike Colvin
Gordon MacBeth
Ira T. Smith
Barbara Abbott
Ish Duckett
Shirley Venhouse
Ellie Gunn

CITY OF McMINNVILLE
MINUTES OF SPECIAL MEETING
of the McMinnville City Council
Held at McMinnville School District Board Room
McMinnville Oregon

Tuesday, February 17, 1998 at 7:30 p.m.

Presiding: Edward J. Gormley, Mayor

Recorder: Carole M. Benedict

Councilors: Present

Tino Aleman
Dave Hughes
Ernie Kirchner
Mary Massey
Robert Payne
Richard Windle

Also present were City Manager Kent L. Taylor, Contract City Attorney Walter Gowell, Community Development Director Don Schut, Planning Director Doug Montgomery, Executive Secretary Rose Lorenzen, and members of the news media Yvette Saarinen and Wanda McAlister of the *News Register,* and Stella Bohnsack of Radio Station KLYC

METER READING	AGENDA ITEM	Cassette No. 1998-4, Side 1
1		CALL TO ORDER: Mayor Gormley called the meeting to order at 7:30 p.m.
	II	PUBLIC HEARINGS – REGARDING ANNEXING TO THE CITY OF McMINNVILLE AND WITHDRAWING FROM THE McMINNVILLE RURAL FIRE PROTECTION DISTRICT A PARCEL OF LAND APPROXIMATELY 78.2 ACRES IN SIZE LOCATED NORTH OF BAKER CREEK ROAD, AND SOUTH OF BAKER CREEK AND FURTHER IDENTIFIED AS A PORTION OF TAX LOT 100, SECTION 18, T. 4 S., R. 4 W., W.M. AND REFERRING THE ANNEXATION TO THE VOTERS OF McMINNVILLE (ANX 3-97) (CONTINUANCE);
		AND
		REGARDING ANNEXING TO THE CITY OF McMINNVILLE AND WITHDRAWING FROM THE McMINNVILLE RURAL FIRE PROTECTION DISTRICT A PARCEL OF LAND APPROXIMATELY 93.4 ACRES IN SIZE LOCATED EAST OF HILL ROAD, SOUTH OF BAKER CREEK ROAD, AND NORTH OF THE PARK MEADOWS SUBDIVISION AND IS FURTHER DESCRIBED AS A PORTION OF TAX LOT 300,

SECTION 18, T. 4 S., R. 4 W., W.M., AND REFERRING THE ANNEXATION TO THE VOTERS OF McMINNVILLE (ANX 4-97) (CONTINUANCE): Mayor Gormley re-opened the public hearing at 7:32 p.m. explaining b th hearing [sic] were being held simultaneously on both annexation proposals.

Planning Director Montgomery, stated that because of the similarities between the two annexation requests, the hearings would be combined for purposes of taking public testimony. Mr. Montgomery advised that after all testimony is taken, and the public hearing closed, the Council would discuss the matter amongst docket which includes a proposal for a large subdivision in the west hills that would provide lots for 341 dwellings, if approved. Mr. Lowe stated that he was mentioning this fact because it is clearly not necessary to add to the city limits at this time due to the availability of existing and proposed residential lots.

439 Shirley Kimball, 121 NW 22nd Street, advised the Council that she opposed the annexation of the Shadden Claim because it was too large.

451 Lucien Gunderman, 18155 SW Baker Creek Road, advised the Council that he was speaking on behalf of himself and his mother, who is a second generation resident owner of Crown Hill Farms. Mr. Gunderman related that the soils from the Shadden Claim are class I and class II agricultural soils and should be farmed, not developed for housing. Mr. Gunderman noted that as full-time farmers, they see a critical loss of prime farm land in the State of Oregon as 50,000 new residents moved into the State in 1997 alone.

516 Gloria Lutz, 1225 Greenbrier, stated that she agreed with the statements of Paul Studebaker and Jim Ludwick.

598 Jim Kreutzbender, 18835 SW Grauer Road, Sheridan, questioned how many acres were inside the city's boundaries that could be developed? Planning Director Montgomery answered that there were approximately 130-180 residential acres that presently could be developed. Mr. Kreutzbender suggested that these acres be developed prior to adding additional acreage to the city.

There was no further testimony in opposition. Mayor Gormley requested cross examination of the opponents.

Daryl King asked Planning Director Montgomery how much control the City actually has regarding growth. Mr. Montgomery replied that the State of Oregon's planning laws set out guidelines that mandate a five-year supply of buildable lands for all of the city's different urban uses. He added that the City is at the end or a twenty-year planning period, and presently in short supply of large parcel commercial land and multi-family zoned land. Responding to Mrs. King's question, Mr. Montgomery advised that if the State's mandates for buildable land are not met, the State Land Conservation and Development Commission (LCDC) can limit the amount of gas tax money allocated to the City, restrict building permits, or impose other similar economic sanctions. Cassette No. 1998-4, Side 5

Don Jones questioned Mr. Studebaker as to the right of the people to vote on annexation requests. Mr. Studebaker responded that the citizens of McMinnville do have the right to vote on these issues which they did in November 1997. Responding to Mr. Jones, Jim Ludwick agreed that the other annexations passed in November were not as well prepared as Mr. Jones' request, nor did

they have a master plan. Dr. Rhatigan responded to Mr. Jones' question, stating that he felt a "piecemeal" approach to developing land in McMinnville was preferable to the large size of the Shadden Claim development.

There being no further cross examination of the opponents, Mayor Gormley requested public agency comments. There being no comments from any of the public agencies contacted, Mayor Gormley requested rebuttal testimony.

Don Jones explained that in the time the Shadden Claim subdivision has been developing, only eleven homes have been constructed, due in large part to strict quality control requirements he has placed on the development. Mr. Jones advised that the property has been serviced by both sewer and water since 1981, and that the development was a planned development, not one that would he piecemealed haphazardly. Mr. Jones advised that he has not heard anything negative regarding the proposed annexations other than the size of the annexation proposal, and the increased traffic that it could bring.

RECESS: There being no further public testimony, Mayor Gormley

closed the public hearing at 10:30 p.m. and called for a short recess.

RECONVENE: Mayor Gormley reconvened the meeting at 10:40 p.m. and requested direction from Contract City Attorney Gowell.

179 Mr. Gowell said that a separate motion for each of the annexation requests should be made. Attorney Gowell reminded the Council that they stood between the Planning Commission, who voted on these applications in a quasi-judicial setting, and the public who voted according to their own personal criteria. He noted that the Council has the ability to approve the applications as recommended by the Planning Commission as long as the Council agrees that all the necessary criteria have been met, or to deny the application based on the Council's legislative perception of the issue.

220 Mayor Gormley directed the Council's discussion to ANX 3-97, the northern parcel. He stated that if both parcels are referred to the voters and the northern parcel was approved, and the southern parcel failed, problems would exist in providing a coordinated extension of utilities to the northern parcel.

Councilor Aleman noted that he felt after hearing all the testimony, he would elect to refer the southern parcel to the voters, but not the parcel north of Baker Creek Road.

* * *

property. Mr. Schut stated that the City would not incur additional expenses if the northern parcel was annexed to the City before the southern parcel; it would, however, be much more expensive for the developer.

Councilor Aleman MOVED, based on the application materials, the testimony received, the findings of fact, and the conclusionary findings for approval to approve the southern parcel (ANX 4-97) for placement on the May 19, 1998 ballot; SECONDED by Councilor Windle. ANX 4-97 PASSED by a majority roll-call vote. NAY: Payne.

Councilor Windle expressed his misgivings regarding submitting the northern piece to the voters and MOVED to deny the northern parcel's (ANX 3-97) placement on the May 19, 1998 ballot on legislative grounds; SECONDED by Councilor Aleman.

Councilor Hughes advised he was in disagreement because he felt it important to have the entire

Shadden Claim development master planned with parkland and commercial areas identified. Councilor Hughes stated he felt both parcels requested for annexation should be referred to the voters. Councilor Payne agreed with Councilor Hughes, while Councilor Kirchner noted his support of Councilor Windle's opinion.

Mayor Gormley called the question. The motion TIED by a roll-call vote with Councilors Payne, Massey, and Hughes voting NAY. Placing the tie-breaking vote, Mayor Gormley voted AYE which denied the northern parcel (ANX 3-97) placement on the May ballot.

Contract City Attorney Gowell read Ordinance 4661 annexing to the City of McMinnville and withdrawing said area and territory from the McMinnville Rural Fire Protection District a parcel of land approximately 93.4 acres in size located east of Hill Road, south of Baker Creek Road, and north of the Park Meadows subdivision, and further described as a portion of Tax Lot 300, Section 18, T. 4 S., R. 4 W., W.M., subject to the approval of the electorate, by title only. (No Councilor present requested that the ordinance be read in full.) The title of the

ordinance was read for the second time. *Ordinance' 4661* PASSED by a majority roll-call vote. NAY: Payne.

Contract City Attorney Gowell noted that Ordinance 4661 will be read again at the February 24, 1998 meeting in that the vote on the ordinance was not unanimous.

III ADJOURNMENT: Mayor Gormley adjourned the meeting at 11:25 p.m.

[Annexation Staff Report]

* * *

Docket ANX 3-97 December 18, 1997

result from the development of this site include: 1) increased tax base which would help pay for existing and future public infrastructure needs; 2) utilization of the planned development overlay designation will help protect fragile and unique environments within the Shadden Claim development (particularly the wetlands and area surrounding the manmade lake); and, 3) commercial development will be clustered and not allowed to develop as strip commercial.

Negative affects [sic] which may result from this development include an increase in traffic from the relatively low level which currently exists, impacts on school enrollment, and changes to the visual environment. These are somewhat offset by the improvements to and construction of streets to accommodate the proposed development, plans by the School District to

construct a new school on property southwest of the site (immediately west of the parcel which is the subject of the second VJ-2 annexation proposal – ANX 4-97) in the near future, and incorporation of rigid covenants and extensive landscaping as has been integrated into the developer's earlier subdivisions.

- It is the applicant's intent to dedicate land within the subject site, near what would be the northeast corner of Meadows Drive and Baker Creek Road, to the City for use as a satellite fire station. This would allow the City to offer shorter response times and increased emergency service to the west side of McMinnville and future residents of the Shadden Claim development. The facility could also be designed in such a manner as to function as a small community center for the neighborhood.

- The City's acknowledged average annual growth rate of 3.1 percent (Required Amendments Remand Order 94-RA-914, LCDC), when applied to the current certified population figure of 23,485 (November 10, 1997, PSU Center for Population Research and Census), results in a projection of an additional 3,873 residents which will be added to McMinnville's population over the next five years. At 2.5 persons per household and 5 dwelling units per acre, some 310 vacant developable acres planned and zoned for residential development are necessary to meet residential land use needs over the next five year period (December 1997 through December 2002).

  Currently, there are approximately 130 acres of vacant, buildable residential land within the city limits. This leaves a deficit of approximately 180 residential acres which are needed to meet the projected five-year need. Some 27 to 49 acres of land which is the subject of this application is proposed for residential development. Utilization of the higher of the two

figures still leaves the city with a five-year residential land deficit of some 131 acres.

- Notice of this request was mailed to property owners located within 300 feet of the subject site. As of the date this report was written, no comments in opposition to the applicant's request had been received by the Planning Department from those public agencies notified.

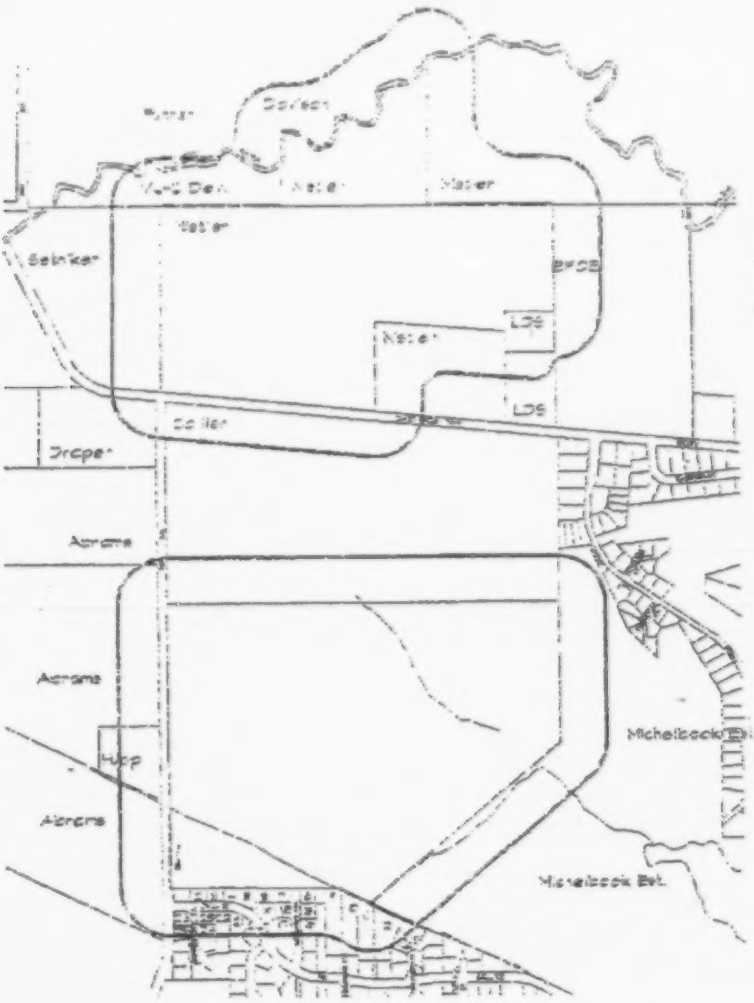
- Procedurally, the review of this annexation request is very similar to what has been done in the past (prior to the recent charter amendment), with a hearing before the Planning Commission

* * *

BEST AVAILABLE COPY

EXHIBIT 2 OF 4
PAGE 2 OF 4

PROPERTY OWNER NOTIFICATION MAP



1. Rosario Hayes
2. Connie Stewart
3. James Henderson
4. Roger Brennan
5. Randy Gunn
6. Mike Stronga
7. Alan Ruden
8. Alan Ruden
9. Al Ower
10. Al Ower
11. William Davies
12. Rodney Pumile
13. Brwitt Cottrell
14. Alan Ruden
15. Walter Mann
16. City
17. Timothy Hart
18. Dennis Culley
19. Stonevlew Homes
20. Kris Allen
21. Michael Wilte
22. Don Strenz
23. William Howell
24. John Boersma
25. Rob Sexton
26. S. Nilsen

RECORDED OWNER: Sharon Collier
P.O. Box 978
McMinnville OR 97128

ANNEXATION:
Annexation of 78.2 acres (ANX 5-97)
Annexation of 45.4 acres (ANX 4-97)

APPROVED BY:
PLANNING COMMISSION
CITY COUNCIL
ORDINANCE NO.

NORTH

SCALE: 1" = 400'

ATTESTED TO BY: _____

ER 103

App. 244

RESOLUTION NO. 1998-7

A resolution authorizing submittal of a ballot title and question for the May 19, 1998 election to the voters regarding annexation of the Shadden Claim property.

RECITALS:

The McMinnville City Council, on the 24th day of February 1998, adopted Ordinance No. 4661 approving the annexation of some 93.0 acres of land referred to as the Shadden Claim property, and withdrawing said property from the McMinnville Rural Fire Protection District, subject to approval of the electorate.

The McMinnville City Charter requires that all requests for annexation, except those otherwise mandated by State law, be referred to a vote of the electorate.

NOW, THEREFORE, BE IT RESOLVED BY THE COMMON COUNCIL OF THE CITY OF McMINNVILLE, OREGON, AS FOLLOWS:

The City of McMinnville does hereby submit to the legal voters of McMinnville, Oregon for their approval or rejection pursuant to McMinnville Ordinance No. 4636 (Annexation Ordinance) at an election to be held on May 19, 1998, the Shadden Claim annexation measure. The ballot title of this measure and the form in which it shall be printed on the official ballot is as follows:

CAPTION: A MEASURE PROPOSING ANNEXATION OF THE SHADDEN CLAIM PROPERTY

QUESTION: Shall the Shadden Claim property, located south of Baker Creek Road, be annexed to the City of McMinnville?

SUMMARY: Approval of this measure would annex a parcel of land, totaling approximately 93.0 acres, to the City of McMinnville. The property is generally located south of Baker Creek Road, north of the Park Meadows subdivision, and east of Hill Road, and is further described as a portion of Tax Lot 300, Section 18, T. 4 S, R. 4 W., W.M. This property is within the McMinnville Urban Growth Boundary, borders the existing McMinnville City limits on the east, north, and south, and is part of a planned development referred to as Shadden Claim. The general land use plan for the Shadden Claim property that is the subject of this annexation request proposes the development of approximately 89 to 91 acres of single-family housing at a density of three to six units per acre. The remaining two to four acres of land would be developed for public park use. The McMinnville Comprehensive Plan, adopted in 1981, designates this property for residential use. Approval of this annexation does not authorize development of this property; additional Planning Commission and City Council approval of specific development plans are required.

The City Recorder is authorized and directed to give notice of the submission of this question to the voters, including a true copy of the complete text and the ballot title for the measure in the form in which it shall be printed on the official ballot and any other information required by law to be published. That notice shall be published in the *News Register* not more than 30 days nor less than 20 days prior to the date of the election. Such notice shall take the form of an approximate one-quarter page layout, which includes

a map of the property to be annexed and unbiased information regarding the annexation.

Adopted by the Common Council of the City of McMinnville at a regular meeting held the 24th day of February 1998 by the following votes:

Ayes: Aleman, Hughes, Kirchner, Massey, Payne, Windle

Nays: _____

Approved this 24th day of February 1998.

/s/ Richard D. Windle
COUNCIL PRESIDENT

Attest:

/s/ Carole [Illegible] Benedict
RECORDER

EXHIBIT "A"
DOCKET ANX 4-97
FINDINGS OF FACT AND
CONCLUSIONARY FINDINGS

[December 18, 1997]

FINDINGS OF FACT

1. The applicant requests annexation of a parcel of land approximately 93.4 acres in size. The site is located east of Hill Road, south of Baker Creek Road, and north of the Park Meadows subdivision and is further described as a portion of Tax Lot 300, Section 18, T. 4 S., R. 4 W., W.M.

2. The subject site is currently zoned County EF-40 (Exclusive Farm Use – 40-acre minimum) and designated as Residential on the City of McMinnville Comprehensive Plan Map, 1980.

3. The request was initiated by a consent petition of the property owner(s) and meets the requirements as set forth in ORS 222.170. The request is subject to a vote of the electorate pursuant to the requirements of the City's annexation ordinance.

4. Sanitary sewer and municipal water and power can serve the site. The municipal waste treatment plant has sufficient capacity to accommodate expected waste flows resulting from future development of the property.

5. The City of McMinnville Engineering and Building Departments, McMinnville City Manager and City Attorney, McMinnville School District Number 40, McMinnville Water and Light, McMinnville Fire Department, and the Yamhill County Planning Department have reviewed this request and have found no conflicts with their interests.

6. Goals and policies from Volume II of the McMinnville Comprehensive Plan of 1981 which are applicable to this request include:

Chapter II Natural Resources

GOAL I: TO PRESERVE THE QUALITY OF THE AIR, WATER AND LAND RESOURCES WITHIN THE PLANNING AREA.

1.00 Urbanizable lands outside the city limits, but inside the Urban Growth Boundary, shall be retained, whenever possible, in agricultural use until such

time as they are needed for urban development.

GOAL IV 1: TO ENCOURAGE THE CONTINUED GROWTH AND DIVERSIFICATION OF McMINVILLE'S ECONOMY IN ORDER TO ENHANCE THE GENERAL WELL-BEING OF THE COMMUNITY AND PROVIDE EMPLOYMENT OPPORTUNITIES FOR ITS CITIZENS.

Chapter V Housing and Residential Development

GOAL V 1: TO PROMOTE DEVELOPMENT OF AFFORDABLE, QUALITY HOUSING FOR ALL CITY RESIDENTS.

General Policies:

58.00 City land development ordinances shall provide opportunities for development of a variety of housing types and densities.

GOAL V 2: TO PROMOTE A RESIDENTIAL DEVELOPMENT PATTERN THAT IS LAND-INTENSIVE AND ENERGY-EFFICIENT, THAT PROVIDES FOR AN URBAN LEVEL OF PUBLIC AND PRIVATE SERVICES, AND THAT ALLOWS UNIQUE AND INNOVATIVE DEVELOPMENT TECHNIQUES TO BE EMPLOYED IN RESIDENTIAL DESIGNS.

Policies:

68.00 The City of McMinnville shall encourage a compact form of urban development by directing residential growth close to the city center and to those areas where urban services are already

available before committing alternate areas to residential use.

71.00 The City of McMinnville shall designate specific lands inside the urban growth boundary as residential to meet future projected housing needs. Lands so designated may be developed for a variety of housing types. All residential zoning classifications shall be allowed in areas designated as residential on the Comprehensive Plan Map.

71.05 The City of McMinnville shall encourage annexation and rezonings which are consistent with the policies of the comprehensive plan so as to achieve a continuous five-year supply of buildable land planned and zoned for all needed housing types (as amended by Ordinance No. 4234, Apr. 5, 1983).

80.00 In proposed residential developments, distinctive or unique natural features such as wooded areas, isolated preservable trees, and drainage swales shall be preserved wherever possible.

81.00 Residential designs which incorporate pedestrian and bikeway paths to connect with activity areas such as schools, commercial facilities, parks, and other residential areas, shall be encouraged.

* * *

a. Written consent to the annexation signed by the requisite number of affected property owners, electors, or both to conduct an election within the area to be annexed, as provided by State law.

b. Legal description of the property to be annexed and a boundary survey certified by a registered engineer or surveyor.

c. Vicinity map and map of the area to be annexed including adjacent City territory.

d. General land use plan indicating types and intensities of proposed development, transportation corridors, watercourses, significant natural features, open space, and adjoining development.

e. Statement of overall development concept and methods by which physical and related social environment of the site, surrounding area, and community will be enhanced.

f. Annexation fees, as set by City Council resolution.

8. The following section of the McMinnville Zoning Ordinance (No. 3380) is applicable to the request:

General Provisions:

Section *17.03.020 Purpose.* The purpose of this ordinance is to encourage appropriate and orderly physical development in the City through standards designed to protect residential, commercial, industrial, and civic areas from the intrusions of incompatible uses; to provide opportunities for establishments to concentrate for efficient operation in mutually beneficial relationship to each other and to shared services; to provide adequate open space, desired levels of population densities, workable relationships between land uses and the transportation system, and adequate community facilities; to provide assurance of opportunities for effective utilization of the land resource; and to promote in other ways public health, safety, convenience, and general welfare.

CONCLUSIONARY FINDINGS FOR APPROVAL

1. The subject request complies with goals and policies of the McMinnville Comprehensive Plan, 1981 (Finding of Fact No. 6) as follows:

(a) *Goal 1, and Policy 1.00* are satisfied in that the subject site would remain in agricultural use until such time that it is converted to urban use.

(b) *Goal IV-1* is satisfied by the request in that the annexation of this site makes possible future requests for urban residential, and public facilities development (park land), thereby enhancing the general well-being of the community and providing development related employment opportunities for its citizens.

(c) *Goal V-1 and V-2 and Policy 68.00* are satisfied by the request in that: this application would make possible additional housing stock to be added to the City; upon development approval, the application of the Uniform Building Code guarantees the quality of the housing; an urban level of services can be made available to adequately serve future development on the site; and, the subject site is located within the urban growth boundary adjacent to recent single-family residential development thereby promoting a compact urban form.

(d) *Policies 58.00, 71.00 and 71.05* are satisfied by the request in that the residential comprehensive plan designation, which is carried by the subject site, allows for development of a variety of housing types and densities within the City. Approval of this request would add additional building land to the City's inventory which could be residentially developed. The lots are to range in size from 6,000 square feet to 9,000 square feet upon which would be constructed conventional single-family, commonwall, and duplex

stick frame housing (commonwall lots would measure 3,500 to 5,000 square feet in size).

The City's acknowledged average annual growth rate of 3.1 percent (Required Amendments Remand Order 94-RA-914, LCDC), when applied to the current certified population figure of 23,485 (November 10, 1997, PSU Center for Population Research and Census), results in a projection of an additional 3,873 residents which will be added to McMinnville's population over the next five years. At 2.5 persons per household and 5 dwelling units per acre, some 310 vacant developable acres planned and zoned for residential development are necessary to meet residential land use needs over the next five year period (December 1997 through December 2002).

Currently, there are approximately 130 acres of vacant, buildable residential land within the city limits. This leaves a deficit of approximately 180 residential acres which are needed to meet the projected five-year need. Some 89 to 91 acres of land which is the subject of this application is proposed for residential development. Utilization of the higher of the two figures still leaves the city with a five-year residential land deficit of some 89 acres.

* * *

addressed where determined to be necessary. The City shall continue to coordinate with the City Water and Light Department in the land use decision making process.

(j) *Policy 155.00* is satisfied since the annexation of the site will not overburden existing police and fire service facilities.

(k) *Goal IX 1* is satisfied since the property is within the McMinnville Urban Growth Boundary and all urban

services are available or can be made available to the site. As previously noted regarding Finding of Fact 1(b), inclusion of this land into the city limits of McMinnville will assist in meeting projected residential land use needs. The orderliness of this application's request is further demonstrated in that the subject sites have been identified for future urban development since their inclusion into the urban growth boundary (UGB) in 1981. The land has been deemed necessary and appropriate by both the City of McMinnville, and the Land Conservation and Development Commission, for urban development by its location within the present urban growth boundary.

2. The criteria listed in *Ordinance No. 4636* (Annexation Ordinance) (Finding of Fact No. 7) are satisfied by the request as follows:

(a) The request conforms to *Section 2(a) and (b)* in that the site is located within the McMinnville Urban Growth Boundary and it is contiguous to the existing city limits.

(b) The request conforms with *Policy 3(a)* for the reasons stated in Conclusionary Finding for Approval No. 1, above. The site is designated for residential use on the McMinnville Comprehensive Plan Map.

(c) *Policy 3(b)(1)* is satisfied in that water and sanitary sewer facilities are currently available to serve the site and would be extended to the site boundary at the time of development.
Additionally:

1. Sanitary sewer

    a. The City of McMinnville's wastewater treatment plant was designed to accommodate the sewage generated from the site requested for annexation as it is located

within the service boundary of the new treatment plant.

b. The new Cozine trunk sewer and pump station improvements have been completed and are currently operational well ahead of the development timeline of this parcel now proposed for annexation. The subject parcel is within the service boundary of the new trunk sewer and pump station.

c. Local sanitary sewer collection lines are proposed to be constructed to City standards as development to urban densities occurs.

2. Storm Drainage

a. The subject site drains into the Cozine Creek Basin. The applicant is required by the City to provide stormwater detention on this parcel to minimize impacts on the capacity of the downstream Cozine Basin due to increased stormwater runoff from improved surfaces.

3. Water

a. A public 16 inch diameter transmission waterline which extends in a south-north direction through the midsection of parcel one was constructed in the 1980's by McMinnville Water and Light. This line is more than adequate to provide the minimum fire flows for the proposed residential development on this site.

b. A public 24 inch diameter transmission waterline was constructed in 1996 from the reservoir on Fox Ridge Road along Hill Road and Baker Creek Road frontage to better serve the northwest part of McMinnville.

This line will intertie with main distribution lines for the site and will provide adequate fire flows for the residential, multi-family, and commercial development proposed for the entire Shadden Claim Planned Development.

(d) Policy 3(b)(2) and Policy 3(c) shall be satisfied since additional right-of-way and street improvements will be required as necessary as conditions of approval for any future requested land use action. In addition:

1. Streets

   a. Hill Road (an arterial) will provide access to the site. As an arterial roadway, and based on existing traffic counts and projected trips generated by this development, this street has adequate capacity to accommodate the traffic from the site requested for annexation.

   b. The applicant is required to make frontage street improvements to Hill Road as the Shadden Claim Planned Development proceeds and approvals are granted by the City.

   c. An internal public street network (modified grid pattern) is proposed within the subject site. These streets will be constructed to City standards.

2. Police, Fire, and School Facilities

   a. The Police and Fire departments, and School District No. 40 have reviewed the application and have offered no objections to this annexation request.

(e) Policy 3(d) is met in that the applicant has provided sufficient findings as required.

(f) Policy 4 shall be met in that, upon Council approval of this request, the application shall be referred to voters in accordance with the requirements of Ordinance 4636 and ORS 222.

(g) Policy 5 (a) through (f) have been met in that the application, as submitted, includes all of the elements required by this policy.

3. The subject request complies with the applicable requirements of the McMinnville Zoning Ordinance (Finding of Fact No. 8) as follows:

(a) *Section 17.03.020* is satisfied by the request for the reasons enumerated in Conclusionary Finding for Approval No. 1.

RP/DRM:ral

[Annexation Staff Report]
Docket ANX 6-98(A) February 23, 1999

CONCLUSIONARY FINDINGS FOR APPROVAL

1. The subject request complies with goals and policies of the McMinnville Comprehensive Plan, 1981 (Finding of Fact No. 6) as follows:

(a) *Goal I. and Policy 1.00* are satisfied in that the subject site would remain in agricultural use until such time that it is converted to urban use.

(b) *Goal IV-1* is satisfied by the request in that the annexation of this site makes possible future requests for urban residential, and public facilities development (park land), thereby enhancing the general well-being

of the community and providing development related employment opportunities for its citizens.

(c) *Goal V-1 and V-2 and Policy 68.00* are satisfied by the request in that: this application would make possible additional housing stock to be added to the City; upon development approval, the application of the Uniform Building Code guarantees the quality of the housing; an urban level of services can be made available to adequately serve future development on the site; and, the subject site is located within the urban growth boundary adjacent to recent single-family residential development thereby promoting a compact urban form.

(d) *Policies 58.00, 71.00, 71.01(A-E) and 71.05* are satisfied by the request in that the residential comprehensive plan designation, which is carried by the subject site, allows for development of a variety of housing types and densities within the City. Approval of this request would add additional building land to the City's inventory which could be residentially developed. The lots are to range in size from 5,000 square feet to 8,000 square feet upon which would be constructed conventional single-family, commonwall, and duplex stick frame housing (commonwall lots would measure 3,500 to 5,000 square feet in size). Future zone change and subdivision applications shall be reviewed subject to applicable density limitations.

(e) *Policies 80.00, and 81.00* are satisfied by the request in that the conceptual plan proposes the preservation of a potential wetland area located in the southern portion of the site and the dedication of two to four acres to the City for public park use and the northerly extension of the Westside Bike and Pedestrian Corridor from the current terminus at the northern edge of the Park Meadows development to the approved location as shown in the Shadden Claim, First Addition

subdivision approval. This path is intended to provide non-vehicular, off-street connection to residential, commercial, and school sites within the west side of McMinnville. Additional pedestrian and bike access would be provided to other activity areas within the site as an element in future development approvals.

* * *

orderliness of this application's request is further demonstrated in that the subject sites have been identified for future urban development since their inclusion into the urban growth boundary (UGB) in 1981. The land has been deemed necessary and appropriate by both the City of McMinnville, and the Land Conservation and Development Commission, for urban development by its location within the present urban growth boundary.

2. The criteria listed in *Ordinance No. 4636* (Annexation Ordinance) (Finding of Fact No. 7) are satisfied by the request as follows:

(a) The request conforms to *Section 2(a) and (b)* in that the site is located within the McMinnville Urban Growth Boundary and it is contiguous to the existing city limits.

(b) The request conforms with Policy 3(a) for the reasons stated in Conclusionary Finding for Approval No. 1, above. The site is designated for residential use on the McMinnville Comprehensive Plan Map.

(c) *Policy 3(b)(1)* is satisfied in that water and sanitary sewer facilities are currently available to serve the site and would be extended to the site boundary at the time of development.

Additionally:

1. Sanitary sewer

    a. The City of McMinnville's wastewater treatment plant was designed to accommodate the sewage generated from the site requested for annexation as it is located within the service boundary of the new treatment plant.

    b. The new Cozine trunk sewer and pump station improvements have been completed and are currently operational well ahead of the development timeline of this parcel now proposed for annexation. The subject parcel is within the service boundary of the new trunk sewer and pump station.

    c. Local sanitary sewer collection lines are proposed to be constructed to City standards as development to urban densities occurs.

2. Storm Drainage

    a. The subject site drains into the Cozine Creek Basin. The applicant is required by the City to provide stormwater detention on this parcel to minimize impacts on the capacity of the downstream Cozine Basin due to increased stormwater runoff from improved surfaces.

* * *

(e) Policy 3(d) is met in that the applicant has provided sufficient findings as required.

(f) Policy 4 shall be met in that, upon Council approval of this request, the application shall be referred to voters in accordance with the requirements of Ordinance 4636 and ORS 222.

(g) Policy 5 (a) through (f) have been met in that the application, as submitted, includes all of the elements required by this policy.

3. The subject request complies with the applicable requirements of the McMinnville Zoning Ordinance (Finding of Fact No. 8) as follows:

(a) *Section 17.03.020* is satisfied by the request for the reasons enumerated in Conclusionary Finding for Approval No. 1.

EXHIBIT "A"
DOCKET ANX 1-99
FINDINGS OF FACT AND
CONCLUSIONARY FINDINGS

[April 14, 1999]

FINDINGS OF FACT

1. The applicant requests annexation of a parcel of land approximately 94 acres in size. The site is located east of Hill Road, south of Baker Creek Road, and north of the Park Meadows subdivision and is further described as a portion of Tax Lot 202 and Tax Lot 300, Section 18, T. 4 S., R. 4 W., W.M.

2. The subject site is currently zoned County EF-40 (Exclusive Farm Use – 40-acre minimum) and designated as Residential on the City of McMinnville Comprehensive Plan Map, 1980.

3. The request was initiated by a consent petition of the property owner(s) and meets the requirements as set forth in ORS 222.170. The request is subject to a vote of the electorate pursuant to the requirements of the City's annexation ordinance.

4. Sanitary sewer and municipal water and power can serve the site. The municipal waste treatment plant has sufficient capacity to accommodate expected waste flows resulting from future development of the property.

5. The City of McMinnville Engineering and Building Departments, McMinnville City Manager and City Attorney, McMinnville School District No. 40, McMinnville Water and Light, McMinnville Fire Department, and the Yamhill County Planning Department have reviewed this request and have found no conflicts with their interests.

6. Goals and policies from Volume II of the McMinnville Comprehensive Plan of 1981 which are applicable to this request include:

Chapter II Natural Resources

GOAL I: TO PRESERVE THE QUALITY OF THE AIR, WATER, AND LAND RESOURCES WITHIN THE PLANNING AREA.

1.00 Urbanizable lands outside the city limits, but inside the Urban Growth Boundary, shall be retained, whenever possible, in agricultural use until such time as they are needed for urban development.

GOAL IV 1: TO ENCOURAGE THE CONTINUED GROWTH AND DIVERSIFICATION OF McMINNVILLE'S ECONOMY IN ORDER TO ENHANCE THE GENERAL WELL-BEING OF THE COMMUNITY

* * *

CONCLUSIONARY FINDINGS FOR APPROVAL

1. The subject request complies with goals and policies of the McMinnville Comprehensive Plan, 1981 (Finding of Fact No. 6) as follows:

(a) *Goal I, and Policy 1.00* are satisfied in that the subject site would remain in agricultural use until such time that it is converted to urban use.

(b) *Goal IV-1* is satisfied by the request in that the annexation of this site makes possible future requests for urban residential, and public facilities development (park land), thereby enhancing the general well-being of the community and providing development related employment opportunities for its citizens.

(c) *Goal V-1 and V-2 and Policy 68.00* are satisfied by the request in that: this application would make possible additional housing stock to be added to the City; upon development approval, the application of the Uniform Building Code guarantees the quality of the housing; an urban level of services can be made available to adequately serve future development on the site; and, the subject site is located within the urban growth boundary adjacent to recent single-family residential development thereby promoting a compact urban form.

(d) *Policies 58.00, 71.00, 71.01 (A-E) and 71.05* are satisfied by the request in that the residential comprehensive plan designation, which is carried by the subject site, allows for development of a variety of housing types and densities within the City. Approval of this request would add additional building land to the City's inventory which could be residentially developed. The lots are to range in size from 5,000 square feet to 8,000 square feet upon which would be constructed conventional single-family, commonwall, and duplex stick frame housing (commonwall lots

would measure 3,500 to 5,000 square feet in size). Future zone change and subdivision applications shall be reviewed subject to applicable density limitations.

(e) *Policies 80.00, and 81.00* are satisfied by the request in that the conceptual plan proposes the preservation of a potential wetland area located in the southern portion of the site and the dedication of seven acres to the City for public park use and the northerly extension of the Westside Bike and Pedestrian Corridor from the current terminus at the northern edge of the Park Meadows development to the approved location as shown in the Shadden Claim, First Addition subdivision approval. This path is intended to provide non-vehicular, off-street connection to residential, commercial, and school sites within the west side of McMinnville. Additional pedestrian and bike access would be provided to other activity areas within the site as an element in future development approvals.

* * *

orderliness of this application's request is further demonstrated in that the subject sites have been identified for future urban development since their inclusion into the urban growth boundary (UGB) in 1981. The land has been deemed necessary and appropriate by both the City of McMinnville, and the Land Conservation and Development Commission, for urban development by its location within the present urban growth boundary.

2. The criteria listed in Ordinance No. 4636 (Annexation Ordinance) (Finding of Fact No. 7) are satisfied by the request as follows:

(a) The request conforms to Section 2(a) and (b) in that the site is located within the McMinnville Urban Growth Boundary and it is contiguous to the existing city limits.

(b) The request conforms with Policy 3(a) for the reasons stated in Conclusionary Finding for Approval No. 1, above. The site is designated for residential use on the McMinnville Comprehensive Plan Map.

(c) Policy 3(b)(1) is satisfied in that water and sanitary sewer facilities are currently available to serve the site and would be extended to the site boundary at the time of development.
Additionally:

1. Sanitary sewer

    a. The City of McMinnville's wastewater treatment plant was designed to accommodate the sewage generated from the site requested for annexation as it is located within the service boundary of the new treatment plant.

    b. The new Cozine trunk sewer and pump station improvements have been completed and are currently operational well ahead of the development timeline of this parcel now proposed for annexation. The subject parcel is within the service boundary of the new trunk sewer and pump station.

    c. Local sanitary sewer collection lines are proposed to be constructed to City standards as development to urban densities occurs.

2. Storm Drainage

    a. The subject site drains into the Cozine Creek Basin. The applicant is required by the City to provide stormwater detention on this parcel to minimize impacts on the capacity of the downstream Cozine Basin due

to increased stormwater runoff from improved surfaces.

* * *

(f) Policy 4 shall be met in that, upon Council approval of this request, the application shall be referred to voters in accordance with the requirements of Ordinance 4636 and ORS 222.

(g) Policy 5(a) through (f) have been met in that the application, as submitted, includes all of the elements required by this policy.

3. The subject request complies with the applicable requirements of the McMinnville Zoning Ordinance (Finding of Fact No. 8) as follows:

(a) *Section 17.03.020* is satisfied by the request for the reasons enumerated in Conclusionary Finding for Approval No. 1.

[LOGO] MCMINNVILLE SCHOOL DISTRICT
ADMINISTRATION OFFICE

To: McMinnville Planning Director

From: Dale Stites

Subj.: Annexation 1-99 and 2-99

Date: March 31, 1999

Dear Doug,

I have had an opportunity to review the latest plans from Mr. Jones for the Shadden Claim annexation and subsequent development plans. The school district as you know is in need of additional elementary school sites. The

Shadden Claim development when complete would compound a serious shortage of elementary school classrooms.

We have spoken to Mr. Jones about the needs of the schools and the impact on our ability to provide adequate classrooms. We have suggested that he provide in his master plan six to seven acres of property adjacent to dedicated parkland for a future elementary school/park. We of course would need to agree with him at some time on the purchase of that property.

We are unable to give a positive recommendation on the plan without the inclusion of the needed school site. I would b [sic] happy to discuss this need and our concerns with you at your convenience.

Sincerely,

/s/ [Illegible]
Dale B. Stites, Director
Business Services

CY:

EXHIBIT "A"
DOCKET ANX 2-99
FINDINGS OF FACT AND
CONCLUSIONARY FINDINGS

[April 14, 1999]

FINDINGS OF FACT

1. The applicant requests annexation of a parcel of land approximately 78 acres in size. The site is located north of Baker Creek Road, and south of Baker Creek, and is further described as Tax Lots 100, 105, 106, and 107, Section 18, T. 4 S., R. 4 W., W.M.

2. The subject site is currently zoned County EF-40 (Exclusive Farm Use – 40-acre minimum) and designated as Residential, and Commercial (some 11 acres located in the southwest corner of the site), on the City of McMinnville Comprehensive Plan Map, 1980.

3. The request was initiated by a consent petition of the property owner and meets the requirements as set forth in ORS 222.170. The request is subject to a vote of the electorate pursuant to the requirements of the City's annexation ordinance.

4. Sanitary sewer and municipal water and power can serve the site. The municipal waste treatment plant has sufficient capacity to accommodate expected waste flows resulting from future development of the property.

5. The City of McMinnville Engineering and Building Departments, McMinnville City Manager and City Attorney, McMinnville School District Number 40, McMinnville Water and Light, McMinnville Fire Department, and the Yamhill County Planning Department have reviewed this request and have found no conflicts with their interests.

6. Goals and policies from Volume II of the McMinnville Comprehensive Plan of 1981 which are applicable to this request include:

   Chapter II Natural Resources

   GOAL I: TO PRESERVE THE QUALITY OF THE AIR, WATER AND LAND RESOURCES WITHIN THE PLANNING AREA.

   1.00 Urbanizable lands outside the city limits, but inside the Urban Growth Boundary, shall be retained, whenever possible, in agricultural use until such time as they are needed for urban development.

GOAL IV 1: TO ENCOURAGE THE CONTINUED GROWTH AND DIVERSIFICATION OF McMINNVILLE'S ECONOMY IN ORDER TO ENHANCE THE GENERAL WELL-BEING OF THE COMMUNITY

* * *

d. General land use plan indicating types and intensities of proposed development, transportation corridors, watercourses, significant natural features, open space, and adjoining development.

e. Statement of overall development concept and methods by which physical and related social environment of the site, surrounding area, and community will be enhanced.

f. Annexation fees, as set by City Council resolution.

8. The following section of the McMinnville Zoning Ordinance (No. 3380) is applicable to the request:

General Provisions:

Section *17.03.020 Purpose*. The purpose of this ordinance is to encourage appropriate and orderly physical development in the City through standards designed to protect residential, commercial, industrial, and civic areas from the intrusions of incompatible uses; to provide opportunities for establishments to concentrate for efficient operation in mutually beneficial relationship to each other and to shared services; to provide adequate open space, desired levels of population densities, workable relationships between land uses and the transportation system, and adequate community facilities; to provide assurance of opportunities for effective utilization of the land resource; and to promote in other ways public health, safety, convenience, and general welfare.

CONCLUSIONARY FINDINGS FOR APPROVAL

1. The subject request complies with goals and policies of the McMinnville Comprehensive Plan, 1981 (Finding of Fact No. 6) as follows:

(a) *Goal I, and Policy 1.00* are satisfied in that the subject site would remain in agricultural use until such time that it is converted to urban use.

(b) *Goal IV-1* is satisfied by the request in that the future development of the planned commercial land within the subject site would foster continued growth and diversification of McMinnville's economy. Additionally, the annexation and subsequent development of the commercial site would enhance the general well-being of the community by providing employment opportunities for its citizens.

(c) *Goal IV-2* is satisfied by the request as this application makes possible, through future submittal and approval of a development application for commercial development, the

* * *

(m) *Goal IX 1* is satisfied since the property is within the McMinnville Urban Growth Boundary and all urban services are available or can be made available to the site. As previously noted regarding Finding of Fact 1(b), inclusion of this land into the city limits of McMinnville will assist in meeting projected residential land use needs. The orderliness of this application's request is further demonstrated in that the subject site has been identified for future urban development since its inclusion into the urban growth boundary (UGB) in 1981. The land has been deemed necessary and appropriate by both the City of

McMinnville, and the Land Conservation and Development Commission, for urban development by its location within the present urban growth boundary.

2. The criteria listed in *Ordinance No. 4636* (Annexation Ordinance) (Finding of Fact No. 7) are satisfied by the request as follows:

(a) The request conforms to *Section 2(a) and (b)* in that the site is located within the McMinnville Urban Growth Boundary and it is contiguous to the existing city limits.

(b) The request conforms with *Policy 3(a)* for the reasons stated in Conclusionary Finding for Approval No. 1, above. The site is designated for residential and commercial use on the McMinnville Comprehensive Plan Map.

(c) *Policy 3(b)(1)* is satisfied in that water and sanitary sewer facilities are currently available to serve the site and would be extended to the site boundary at the time of development.
Additionally:

1. Sanitary sewer

    a. The City of McMinnville's wastewater treatment plant was designed to accommodate the sewage generated from the site requested for annexation as it is located within the service boundary of the new treatment plant.

    b. The new Cozine trunk sewer and pump station improvements have been completed and are currently operational well ahead of the development timeline of this parcel now proposed for annexation. A portion of the subject parcel is within the service boundary of the new trunk sewer and pump station.

c. Local sanitary sewer collection lines are proposed to be constructed by the applicant to City standards as development to urban densities occurs.

* * *

(f) Policy 4 shall be met in that, upon Council approval of this request, the application shall be referred to voters in accordance with the requirements of Ordinance 4636 and ORS 222.

(g) Policy 5(a) through (f) have been met in that the application, as submitted, includes all of the elements required by this policy.

3. The subject request complies with the applicable requirements of the McMinnville zoning Ordinance (Finding of Fact No. 8) as follows:

(a) *Section 17.03.020* is satisfied by the request for the reasons enumerated in Conclusionary Finding for Approval No. 1.

To: City of McMinnville City Council
City of McMinnville Planning Commission

From: Werner G. Nistler, Jr.
Colleen T. Nistler
Willie Darnell "Don" Jones

Re: Annexation of Land: Map R.4W., T4S. – Section 18 – Tax Lot 100

In accordance with ORS 222.170, we, the undersigned owners of Tax Lot 100, of Map R.4W., T4S., Section 18, request that this property, in its entirety, be annexed to the City of McMinnville, Oregon without calling for or

holding an election for annexation. We affirm that the subject property is contiguous to the City of McMinnville's city boundary. We further affirm that the subject has all requisite key urban facilities, e.g., sewer, water and electric, on the property or reasonably proximate to the property to meet all of the existing city standards for the development of urban lands. It should be noted that adequate sewer and water lines were installed on or proximate to the subject property in 1981, in preparation for the development of said property.

We, the undersigned, hereby acknowledge and affirm by our signatures that we own one hundred percent (100%) of the land in the contiguous territory being proposed for annexation.

/s/ Werner G Nistler Jr	3/10/99
Werner G. Nistler, Jr.	Date
/s/ Colleen T. Nistler	3/10/99
Colleen T. Nistler	Date
/s/ William Darnell Don Jones	3/11/99
William Darnell "Don" Jones	Date

EXHIBIT "A"
DOCKET ANX 6-99
FINDINGS OF FACT AND
CONCLUSIONARY FINDINGS

[December 16, 1999]

FINDINGS OF FACT

1. The applicant requests annexation of a parcel of land approximately 65 acres in size. The site is located south of Baker Creek Road, east of Hill Road, and

north of Wallace Road, and is further described as a portion of Tax Lot 300, Section 18, T. 4 S, R. 4 W., W.M.

2. The subject site is currently zoned County EF-40 (Exclusive Farm Use – 40-acre minimum) and designated as Residential on the City of McMinnville Comprehensive Plan Map, 1980.

3. The request was initiated by a consent petition of the property owner(s) and meets the requirements as set forth in ORS 222.170. The request is subject to a vote of the electorate pursuant to the requirements of the City's annexation ordinance.

4. Sanitary sewer and municipal water and power can serve the site. The municipal waste treatment plant has sufficient capacity to accommodate expected waste flows resulting from future development of the property.

5. The City of McMinnville Engineering and Building Departments, McMinnville City Manager and City Attorney, McMinnville School District No. 40, McMinnville Water and Light, McMinnville Fire Department, and the Yamhill County Planning Department have reviewed this request and have found no conflicts with their interests.

6. Goals and policies from Volume II of the McMinnville Comprehensive Plan of 1981 which are applicable to this request include:

Chapter II Natural Resources

GOAL I: TO PRESERVE THE QUALITY OF THE AIR, WATER, AND LAND RESOURCES WITHIN THE PLANNING AREA.

1.00 Urbanizable lands outside the city limits, but inside the Urban Growth Boundary,

shall be retained, whenever possible, in agricultural use until such time as they are needed for urban development.

GOAL IV 1: TO ENCOURAGE THE CONTINUED GROWTH AND DIVERSIFICATION OF McMINNVILLE'S ECONOMY IN ORDER TO ENHANCE THE GENERAL WELL-BEING OF THE COMMUNITY AND PROVIDE EMPLOYMENT OPPORTUNITIES FOR ITS CITIZENS.

* * *

Section 5. *Application Requirements.* Applications for annexation shall be made on forms provided by the Planning Department and include the following material:

a. Written consent to the annexation signed by the requisite number of affected property owners, electors, or both to conduct an election within the area to be annexed, as provided by State law.

b. Legal description of the property to be annexed and a boundary survey certified by a registered engineer or surveyor.

c. Vicinity map and map of the area to be annexed including adjacent City territory.

d. General land use plan indicating types and intensities of proposed development, transportation corridors, watercourses, significant natural features, open space, and adjoining development.

e. Statement of overall development concept and methods by which physical and related

social environment of the site, surrounding area, and community will be enhanced.

f. Annexation fees, as set by City Council resolution.

8. The following section of the McMinnville Zoning Ordinance (No. 3380) is applicable to the request:

General Provisions:

Section *17.03.020 Purpose.* The purpose of this ordinance is to encourage appropriate and orderly physical development in the City through standards designed to protect residential, commercial, industrial, and civic areas from the intrusions of incompatible uses; to provide opportunities for establishments to concentrate for efficient operation in mutually beneficial relationship to each other and to shared services; to provide adequate open space, desired levels of population densities, workable relationships between land uses and the transportation system, and adequate community facilities; to provide assurance of opportunities for effective utilization of the land resource; and to promote in other ways public health, safety, convenience, and general welfare.

CONCLUSIONARY FINDINGS FOR APPROVAL

1. The subject request complies with goals and policies of the McMinnville Comprehensive Plan, 1981 (Finding of Fact No. 6) as follows:

* * *

by both the City of McMinnville, and the Land Conservation and Development Commission, for urban development by its location within the present urban growth boundary.

2. The criteria listed in *Ordinance No. 4636* (Annexation Ordinance) (Finding of Fact No. 7) are satisfied by the request as follows:

   (a) The request conforms to *Section 2(a) and (b)* in that the site is located within the McMinnville Urban Growth Boundary and it is contiguous to the existing city limits.

   (b) The request conforms with *Policy 3(a)* for the reasons stated in Conclusionary Finding for Approval No. 1, above. The site is designated for residential use on the McMinnville Comprehensive Plan Map.

   (c) *Policy 3(b)(1)* is satisfied in that water and sanitary sewer facilities are currently available to serve the site and would be extended to the site boundary at the time of development. Additionally:

1. Sanitary sewer

   a. The City of McMinnville's wastewater treatment plant was designed to accommodate the sewage generated from the site requested for annexation as it is located within the service boundary of the new treatment plant.

   b. The new Cozine trunk sewer and pump station improvements have been completed and are currently operational well ahead of the development timeline of this parcel now proposed for annexation. The subject parcel is within the service boundary of the new trunk sewer and pump station.

   c. Local sanitary sewer collection lines are proposed to be constructed to City standards as development to urban densities occurs.

2. Storm Drainage

   a. The subject site drains into the Cozine Creek Basin. The applicant is required by the City to provide stormwater detention on this parcel to minimize impacts on the capacity of the downstream Cozine Basin due to increased stormwater runoff from improved surfaces.

3. Water

   a. A public 16-inch diameter transmission waterline which extends in a south-north direction through the midsection of parcel one was constructed in the 1980's by McMinnville Water and Light. This line is more than adequate to provide the minimum fire flows for the proposed residential development on this site.

   b. A public 24-inch diameter transmission waterline was constructed in 1996 from the reservoir on Fox Ridge Road along Hill Road and Baker Creek Road frontage to better serve the northwest part of McMinnville. This line will tie with main distribution lines for the site and will provide adequate fire flows for the residential, multi-family, and commercial development proposed for the entire Shadden Claim Planned Development.

(d) Policy 3(b)(2) and Policy 3(c) shall be satisfied since additional right-of-way and street improvements will be required as necessary as conditions of approval for any future requested land use action. In addition:

1. Streets

   a. NW Meadows Drive (anticipated minor collector) will provide access to the site, and most traffic trips will lead to either Baker Creek Road or Hill Road (both arterial roadways), or to NW Wallace Road (also a minor collector). Based on existing traffic counts and projected trips generated by this development, these streets have adequate capacity to accommodate the traffic from the site requested for annexation.

   b. An internal public street network (modified grid pattern) is proposed within the subject site. These streets will be constructed to City standards.

2. Police, Fire, and School Facilities

   a. The Police and Fire departments, and School District No. 40 have reviewed the application and have offered no objections to this annexation request.

   (e) Policy 3(d) is met in that the applicant has provided sufficient findings as required.

   (f) Policy 4 shall be met in that, upon Council approval of this request, the application shall be referred to voters in accordance with the requirements of Ordinance 4636 and ORS 222.

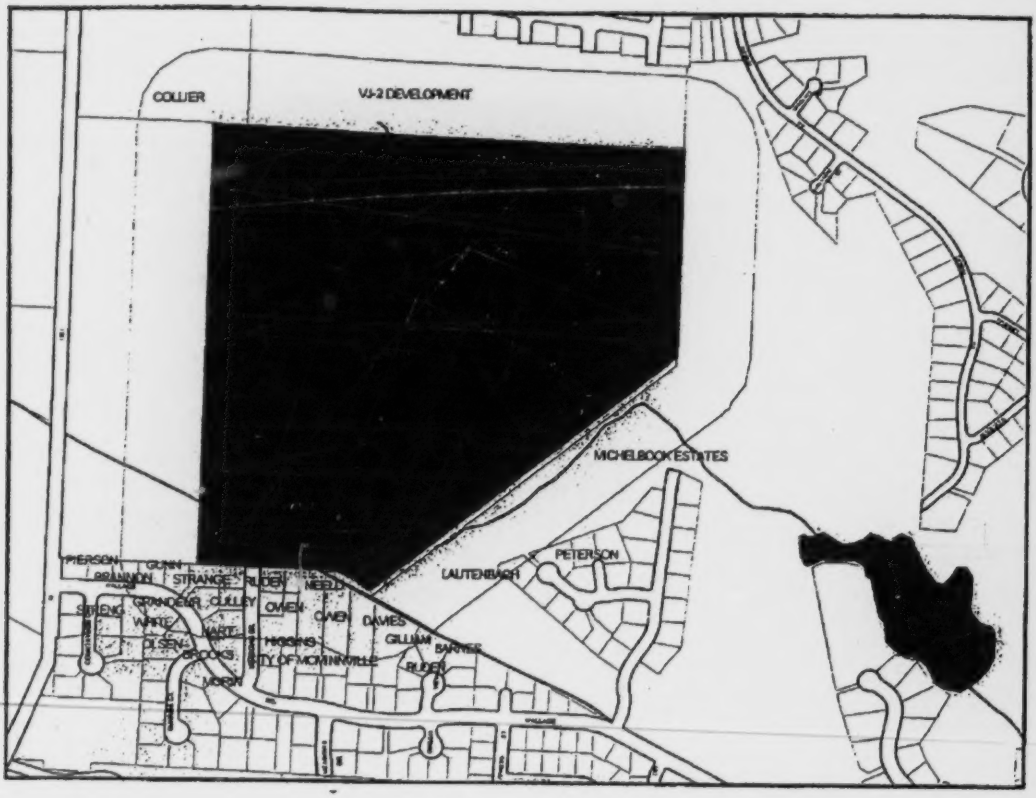
   (g) Policy 5(a) through (f) have been met in that the application, as submitted, includes all of the elements required by this policy.

3. The subject request complies with the applicable requirements of the McMinnville Zoning Ordinance (Finding of Fact No. 8) as follows:

   (a) *Section 17.03.020* is satisfied by the request for the reasons enumerated in Conclusionary Finding for Approval No. 1.

Notification Map

ER 131



App. 281

ANX 6-99
VJ2 Development Corporation is requesting annexation of approximately 65 acres of land. The applicant's general land use plan for the site proposes future single-family residential development planned at a density of four to six dwelling units per acre on 59 acres of the subject site, and dedication of some six acres of land for public park use. The subject property is generally located south of Baker Creek Road, east of Hill Road, and north of Wallace Road, and is further described as a portion of Tax Lot 300, Section 18, T. 4 S. R. 4W., W.M.

RECORDED OWNER:

Emerson J. Collier
P.O. Box 673
McMinnville, OR 97128

APPROVED BY:

PLANNING COMMISSON:

CITY COUNCIL
ORDINANCE NO.:

800 0 800 Feet

ATTESTED TO BY: _____

EXHIBIT 020
PAGE 16 OF ___

* * *

a sanitary sewer of the City, is required at his or her expense to install suitable toilet facilities therein, and to connect such facilities directly with the proper sewer in accordance with the provisions of Chapters 13.04 through 13.12, within ninety days after date of official notice to do so, provided that the sewer is within one hundred and fifty feet of the property line.

13.04.080 Private wastewater disposal. A. Where a public sanitary sewer is not available under the provisions of Section 13.04.070(D) the building sewer shall be connected to a private sewage disposal system complying with the provisions of this section.

B. Before commencement of construction of a private wastewater disposal system, the owner shall first obtain a written permit from the county sanitarian. The application for such permit shall be made in writing and supplemented by any plans, specifications, and other information as are deemed necessary by the county sanitarian and Director. A permit and inspection fee as required shall be paid to the proper agency at the time application is filed.

C. A permit for a private wastewater disposal system shall not become effective until the installation is completed to the satisfaction of the county sanitarian. The agent of the City shall be allowed to inspect the construction and no underground portions shall be covered until such inspection.

D. The type, capacities, location and the layout of a private wastewater disposal system shall comply with all recommendations of the Department of Health of the state

of Oregon. No septic tank or cesspool shall be permitted to discharge to any public sewer or natural outlet.

E. At such time, as a public sewer becomes available to a property served by a private wastewater disposal system, a connection shall be made to the public sewer in compliance with Chapters 13.04 through 13.12, and any septic tanks, cesspools, and similar private wastewater disposal facilities shall be abandoned and after pumping filled with suitable material at the time of said connection.

F. The owner shall operate and maintain the private wastewater disposal facilities in a sanitary manner at all times, at no expense to the City of McMinnville.

G. No statement contained in Chapters 13.04 through 13.12 shall be construed to interfere with any additional requirements that may be imposed by the health officer.

* * *

ORDNANCE NO. 4608

An Ordinance annexing unincorporated territories surrounded by the City of McMinnville, described in Exhibits "A," "B," "C," and "D," which are attached hereto and incorporated herein by this reference, and withdrawing said areas and territories from the McMinnville Rural Fire Protection District:

RECITALS:

In accordance with Oregon Revised Statutes 222.750, the City of McMinnville is granted the power and authority to annex land or territory surrounded by the corporate

limits or boundaries of said city with or without the consent of any owner of property within such territory or resident in the territory provided such land or territory is not an incorporated city; and

McMinnville Ordinance No. 4357, known as the annexation ordinance, requires in Section 10 that the City annex any "island" of unincorporated territory within one year of the date of the annexation which created the island; and

The City of McMinnville has over time annexed to said City all property surrounding the herein described territories; and

Said territories as herein described are not an incorporated city under the laws of the State of Oregon; now, therefore,

THE CITY OF McMINNVILLE ORDAINS AS FOLLOWS:

Section 1. That inasmuch as the lands and territories herein described in Exhibits "A," "B," "C," and "D" are unincorporated areas and said unincorporated areas are surrounded by the corporate limits of the City of McMinnville, it is hereby ORDERED, DECLARED, and PROCLAIMED that the areas and territories herein described in Exhibits "A," "B," "C," and "D" are hereby annexed to the City of McMinnville, Yamhill County, State of Oregon.

Section 2. That the Recorder of the City of McMinnville, Yamhill County, Oregon, is hereby authorized and directed to make and submit to the Secretary of State of the State of Oregon, the Assessor of Yamhill County, State of Oregon, and the County Clerk of Yamhill County, State of Oregon, a certified copy of the following document:

(a) A copy of this ordinance.

Section 3. That the areas and territories hereinabove referred to are withdrawn from the McMinnville Rural Fire Protection District subject to the annexation becoming final.

Section 4. That this ordinance shall be subject to the terms and conditions of Ordinance No. 3823. entitled "Initiative and Referendum" for a period of thirty days.

First Reading – Read and passed by the Council this 27th day of February 1996 by the following votes:

Ayes: Hughes, Massey, Payne, Tomcho, Windle

Nays: Kirchner

Second Reading – Read and passed by the Council this 12th day of March 1996 by the following votes:

Ayes: Hughes, Massey, Payne, Tomcho, Windle

Nays: Kirchner

Abstentions:

Approved this 12th day of March 1996.

/s/ Edward J. Gormley
MAYOR

Attest:

/s/ Carole Benedict
RECORDER

ISLAND" ANNEXATIONS
January 24, 1996

AREA	ASSR NO.	OWNER	ACREAGE
A	4419-400	Albert Vossler	9.5
B	4419AC-100	Donna Squires	15.1
C	4429-700	G. Morton	4.2
	4429BC-3500	B. Thomas	1.2
D	4429BD-601	Beverly Malone	1.6
E	4415-2501	Joan Miller	31.4
F	4421-900	Herman Johansen	12.4
	4421-1000	Martha Dewitz	0.2
	4421-1001	Earl Full	4.1
G	4422CD-1700	D. Full	5.0
	4422CD-1900	Mike Full	4.4
	4422CD-2000	Mary Bennett	4.6
H	4426-500	City of McMinnville	8.0
	4426-700	Bernards Family Trust	90.5
TOTAL:			**192.1**

Why DLCD Supports Senate Bill 1137,
To Prohibit City-Wide Votes on Annexations

The Department of Land Conservation and Development (DLCD) believes that requiring a city-wide vote to annex land already planned and zoned for urban development

works against sound land use planning. For that reason, DLCD supports Senate Bill 1137; which does the following:

- Prohibits cities from adopting or enforcing charter provisions or ordinances that require submittal of proposed annexations to electors;
- Applies that prohibition to charter provisions or ordinances in effect since January 1, 1996;
- Provides that city councils make final determinations about annexation proposals;
- Requires city councils to adopt standards for approval of annexation proposals.

Why is DLCD concerned about city-wide votes on annexation proposals? The answers to that question are found in Oregon's statewide program for land use planning: That program is based on a simple but profound idea – that the state and its cities and counties should, as a matter of public policy, direct growth and development toward appropriate places. Generally, those "appropriate places" are urban areas – lands inside of urban growth boundaries. We direct growth toward urban areas for two main reasons.

One is cost-effectiveness. Cities are essentially factories that "manufacture" the complex and costly infrastructure and public services needed to serve modern development. It is more cost-effective to direct development to places where these service "factories" already exist than to continually expand them or build new ones to serve sprawling, uncontrolled development The other reason is conservation. We direct growth toward urban areas so that we can conserve the rural farm lands, forest lands, coastal

beaches, and other resources that are so essential to Oregon's economy and quality of life.

Under our planning system, all of our cities have drawn urban growth boundaries. Within those boundaries, they have planned and zoned a twenty-year supply of "urbanizable land" – areas where future growth and development will occur. These plans, boundaries and zoning ordinances have been developed through an open public process. Moreover, they have been "coordinated." That is, cities, counties, special districts, and state agencies have cooperated to make their plans and policies fit together. For example, when a city draws its urban growth, boundary, the surrounding county knows that land outside the boundary is not available for urban development, so it plans and zones the area for rural uses.

Annexation is one of several tools with which a city can create the type of community envisioned in the local comprehensive plan. In the language of planners, annexation is an "implementing measure." It is a device for carrying out policy already decided in the local planning process.

Referring each annexation proposal to a city-wide vote would make annexation an independent policy question, to be decided in isolation from and perhaps contrary to the comprehensive plan. It would make the annexation process a way of thwarting the comprehensive plan rather than a tool for implementing it, thus causing the problems described on the next page.

First, votes against annexation are likely to increase sprawl and loss of farmland. If a city's voters use the annexation vote to block development inside the urban growth boundary, that will increase pressure for the

development to go outside the boundary, onto farm or forest lands. City-wide annexations votes will not stop development. They will only drive it to other locations, where it is likely to bring greater harm to farms, forests, and natural resources.

Second, anti-annexation votes may cause land to be used less efficiently. Suppose, for example, that a city's voters defeat a proposal to annex a fifty-acre parcel. Since the developer cannot get urban services like sewers and water, he therefore creates a rural residential subdivision of one-acre lots. The result is a sprawling development served by gravel roads, private wells, and septic tanks. Such development is a far less efficient use of land. It will cause some of the very problems that those who voted against annexation were concerned about.

Third, annexation votes would bypass a planning process in which Oregonians have invested a great deal of time, money, and energy. Requiring a vote on every annexation would create a system of "ballot-box planning" that would waste much of a community's investment in planning. Planning and zoning an area for urban growth become a useless exercise if an annexation vote a few years later can stop urban development in that area.

Fourth, annexation votes are likely to increase costs and litigation and reduce predictability for land owners, developers, and local governments: One of the main purposes of land use planning is to make the rules for development clear and predictable. With a good plan, everyone knows where development can and cannot go and where city services like sewers and streets will be needed. But submitting all annexation proposals to a city-wide vote conflicts works against that purpose. It makes it hard

to know whether land in urban areas can ever be served or developed.

Fifth, annexation votes detract from the coordination that has been a central feature of Oregon's statewide planning program. Our 240 city plans, 36 county plans, and state agency programs have been coordinated with each other. One city knows how much and where a neighboring city plans to grow. But such coordination has little value if annexation votes can overturn those plans.

Consider, for example, what might happen if Bend and Redmond were to adopt a system of city-wide annexation votes. The development blocked in those two cities might very well spill into the City of Sisters, rendering its plan meaningless. Or consider how much unexpected development might be forced on Silverton and Dallas if Salem were to adopt a system of voting on annexations.

The annexation voting process has been described as a way to let people have a say in how their community will develop. But they already have that say. That's what Oregon's land use planning system is all about: it is a process for involving each community in long-range, coordinated decisions about land, natural resources, and public services.

Submitting each proposal for annexation to a city's voters will hinder, not help, our longstanding, well-tested system for sound local planning in Oregon. ❑

Department of Land Conservation and Development (DLCD)
1175 Court Street NE, Salem OR 97310 – 503 373-00500
MARCH 1997

STATUS OF 1996 ANNEXATIONS

ANX 0-96: - City of McMinnville
- Sent to state April 23, Returned to City to redo maps, Maps returned to state on August 20th.

ANX 1-96: - Leonard Johnson
- Sent to state April 23, Returned to City to redo map and exhibit, Map and exhibit returned to state on August 20th.

ANX 2-96 - Leonard Johnson
- Under Appeal

ANX 3-96 - McMinnville School District
- Sent to state and approved

ANX 4-96 - Wing Louie Trust
- Sent to state April 23, Returned to City to redo exhibit, Exhibit returned to state on August 20th.

ANX 5-96 - J & M Church/Burch-Feero
- Awaiting opinion

ANX 6-96 - Gene McMullin/Phyllis Moyer
- Awaiting opinion

ANX 7-96 - Charles and Margaret Walker
- Awaiting opinion

ANX 8-96 - David and Joanne Kraemer
- Awaiting opinion

ANX 9-96 - City of McMinnville
- Sent to state April 23, Returned to City to redo the map that would accompany exhibit "A", Map returned to state on August 20th.

ANX 10-96 - Don Jones/VJ2 Development Co.
- Still being processed

City of McMinnville
• McMinnville, Oregon 97128 •
230 East Second Street 503-472-9371

July 31, 1996

Mr. Kurt Feero
1631 Bonnie Jean Place
McMinnville, OR 97128

Dear Mr. Feero:

I have received your letter of July 26th discussing the status of your 11.5 acres next to the hospital and have discussed the matter with the Kent Taylor and Rick Highsmith.

While I have no personal knowledge of exactly how the conversation went between Highsmith and Mackenzie Saito, there is every intent on the part of all City staff members to discuss with you or your representative the development of the Three Mile Lane parcel. However, the legal status of this parcel's annexation into the City is not yet fully resolved.

As you are aware, the ordinance annexing it had only been read once prior to the amendment of the City Charter by the voters on May 21st, and the second and final reading occurred on May 28th. This new Charter amendment requires that annexations be approved by a vote of the citizens and eliminates the City Council's ability to unilaterally annex land. How this Charter change affects an annexation in progress is not clear.

In the near future the Council will discuss the manner in which they may address the parcels that could be affected by the Charter amendment. One choice is to take no action and process annexation requests and allow them

to be challenged. Another would be to commence legal proceedings that would seek to validate them. I will keep you informed of the actions contemplated by the Council.

In the interim, City staff will discuss and consider development proposals on your parcel but will not accept a formal rezoning application.

Yours truly,

/s/ Clifton Ross
Clifton Ross
City Attorney

ORDINANCE NO. 4705

An Ordinance, subject to the approval of the electorate, annexing to the City of McMinnville the following described area and territory and withdrawing said area and territory from the McMinnville Rural Fire Protection District:

> A parcel of land approximately 78.2 acres in size located north of Baker Creek Road, and south of Baker Creek and further identified as Tax Lot 100, 106, 107, and a portion of Tax Lot 103 Section 18, T. 4 S., R. 4 W., W.M.

RECITALS

That Werner and Colleen Nistler and W. D. Jones are the owners of the tract of land described in Exhibit "A", which is attached hereto and by this reference incorporated herein and have either petitioned or consented to the annexation of said territory to the City of McMinnville (ANX 2-99); and

That said area and territory described in Exhibit "A" is a part of the McMinnville Rural Fire Protection District; McMinnville Rural Fire Protection District has no liabilities or indebtedness; and the City of McMinnville, Oregon, is furnishing fire protection to the McMinnville Rural Fire Protection District under a contract between said municipalities; and

That pursuant to Ordinance 4636, the Planning Director of the City of McMinnville, Oregon, caused notice of a public hearing on the request of said annexation and withdrawal from the McMinnville Rural Fire Protection District to be published not less than five days nor more than fifteen days before the hearing. In addition, written notice of the requested change was mailed to all owners of property within three hundred feet of the exterior boundary of the subject property not less than twenty days nor more than thirty days before the hearing. Proof of publication and written notice is on file in the Planning Department office; and

That said public hearing was held on the 14th day of April 1999 and continued to the 20th day of May 1999 at 7:30 p.m. before the McMinnville Planning Commission in the McMinnville School District Board Room in the City of McMinnville, Oregon, at which time all interested persons thus appearing were invited to be heard on the question of the annexation of said area and territory herein first described; and

The Planning Commission, being fully informed about said request, found that said change conformed with the review criteria listed in Ordinance 4636 (the Annexation Ordinance) based on the material submitted by the applicant and findings of fact and the conclusionary findings for

approval contained in the staff report, all of which are on file in the Planning Department, and that the annexation request is consistent with the Comprehensive Plan; and

The Planning Commission approved said annexation request and has recommended the Council forward it to the electorate;

* * *

APPENDIX P

JOHN W. SHONKWILER, P.C.
John W. Shonkwiler, OSB #75337
13425 SW 72nd Ave.
Tigard, OR 97223
Telephone: (503) 624-0917

Of Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DON JONES and **VJ-2 DEVELOPMENT, Inc.**, an Oregon corporation, Plaintiffs, vs. **CITY OF MCMINNVILLE,** an Oregon municipal corporation, Defendant.	No. 04-CV-47-AA PLAINTIFFS' RESPONSE TO DEFENDANT'S CONCISE STATEMENT OF MATERIAL FACTS

I. RESPONSE TO DEFENDANT'S CONCISE STATEMENT OF MATERIAL FACTS

1. Plaintiffs accept Paragraphs 1-4 of Defendant's Concise Statement of Material Facts.

2. In Defendant's paragraph 5, Plaintiffs denies the statement that the "Plaintiffs did not contend that the City treated them unfairly in processing their proposals." Defendant's interpretation is in error. Plaintiff Jones' deposition questions pertained to what he knew in addition to what was alleged in the Complaint. Plaintiff Jones

testified that the events and his injury were identified in the Complaint. Plaintiffs Ex. 045 at 8, 9. Plaintiff Jones learned of new matters from discovery related to the lawsuit. Jones Affidavit at p. 6. Documents identified that Defendant treated Plaintiffs' annexation proposals differently than other similar properties by delaying Plaintiffs' proposals while expediting the other annexations to approval. Plaintiffs Ex. 030 at p. 1-3 (192.1 acres) on March 12, 1996, on May 14, 1996 (ANX 9-96 immediately before passage of the annexation charter amendment on May 21, 1996). Defendant City did not make this expedited annexation practice available to Plaintiffs, and the delay in Plaintiffs' annexation applications caused Plaintiffs' property to be subject to the new charter amendment requiring a vote of City's citizens. Plaintiffs Ex. 004, Jones Affidavit at p. 3.

3. In Defendant's paragraph 6, Defendant's statement that "VJ-2" entered into an agreement to purchase property is misleading. Both Plaintiff Jones and Plaintiff VJ-2, development, Inc. entered into the purchase agreements. Plaintiffs Ex. 009 (signature block for the purchaser signed by Don Jones as "Owner"). Don Jones testified in his deposition that "I'm the owner." When asked who had title to the property?, Mr. Jones answered: "VJ-2 Development and Don Jones." Plaintiffs Ex. 045 Jones Deposition at p. 6. Defendant City has admitted in its own documents that Mr. Jones was one of the "owners" of the property. Plaintiffs Ex. 019 at 1, 019 at 18, 020 at 1.

Defendant has incorrectly characterized Plaintiffs' property as being zoned EFU-80. The property was actually zoned at relevant times as EFU-40 (Exclusive Farm Use-40 acre minimum). Plaintiffs Exs. 011 at 3, Plaintiffs Exs. 013 at 8, Plaintiffs Exs. 015 at 9.

4. In Defendant's paragraph 7, Plaintiffs disagree with the interpretation in Defendant's statement regarding VJ-2 developing a different plan and the City Council denied the annexation because the planning commission had not yet considered the new plan. The documents establish that the City Council denied Plaintiffs' annexation proposal only because the City Council wanted "to consider the annexation with regard to the total master plan for the entire build-out of the" Plaintiffs entire property. Plaintiffs Ex. 004 at 1. Plaintiffs further dispute the interpretation that Plaintiffs had no reason to believe the Council made the request for improper reasons, for delay or to harm them. Plaintiff Jones testified in his deposition that his claims were identified in the Complaint. Plaintiffs Ex. 045 at 8, 9. Plaintiff Jones learned of new matters from discovery related to the lawsuit that further support the alleged improper reasons, delay and harm caused by the defendant. Jones Affidavit at p. 6.

5. In Defendant's paragraph 8, Plaintiffs disputes that they have no information that the Charter amendment was not passed or utilized to harm them. Plaintiffs Ex. 045 at 8, 9. Plaintiff Jones learned of new matters from discovery related to the lawsuit that further support the alleged improper reasons, delay and harm caused by the defendant. Jones Affidavit at p. 6.

6. In Defendant's paragraph 9, Plaintiffs dispute that the City approved and supported "all" of Plaintiffs' annexation requests. Defendant denied ANX 3-95 on June 29, 1995. Plaintiffs Ex. 004 at 1, Plaintiffs Ex. 010 at 1. Defendant indefinitely continued without reviewed ANX 10-96. Plaintiffs Ex.002 at 1. Defendant denied ANX 3-97. Plaintiffs Ex. 014 at 5. Defendant delayed annexations ANX 6-98 and ANX 7-98 on the alleged premise of

reducing the size of each annexation and then later reviewed the annexations at the original larger sizes. Plaintiffs Ex.016 at 1, 3.

7. In Defendant's paragraph 10, Plaintiffs disagree with the interpretation that subsequent owners of a portion of Plaintiffs' property obtain annexations because they submitted smaller portions of property and "presumably" because they were smaller scale and had lesser traffic impacts. All of these are not material facts, but are speculation, not ultimate facts, and at best "conclusions." Documents and testimony identify that McMinnville School District and Alan Ruden acquired approximately one third of Plaintiffs' property and subsequently annexed that one third, which was approximately equivalent to several of the Plaintiffs' annexation applications that were denied by the City. Plaintiffs Ex. 040 at 47-51, Plaintiffs Ex. 006-007, Plaintiffs Ex. 043 at 21-23.

8. In Defendant's paragraph 11, Plaintiffs dispute Defendant's assertion that the City's comprehensive plan expressly prohibits the extension of urban services to unincorporated areas. Comprehensive Plan policies 139.00 and 140.00 contemplate the possibility of such an extraterritorial extension of services. Plaintiffs Ex. 008 at 9. Plaintiffs further dispute Defendant's statement that Plaintiff Jones admits that the City's denial of his request for extension of services was not wrong. Plaintiffs Ex. 045 at 8, 9. Plaintiff Jones learned of new matters from discovery related to the lawsuit that further support the alleged improper reasons, delay and harm caused by the defendant. Jones Affidavit at p. 6.

9. In Defendant's paragraph 12, Plaintiffs challenge the assertion that none of the City's employees or City

Council members are members of Friends of Yamhill County. The Planning Director's testimony was not an ultimate fact, but merely a speculation.

10. In Defendant's paragraph 13, Plaintiffs dispute the characterization that Plaintiffs' lawsuit was the "first step" taken by Plaintiffs to redress Plaintiffs' alleged wrongs. Plaintiffs filed ten (10) repeated annexation applications with varying parcel sizes, and thereafter in frustration filed applications for extension of public facilities and services and modification of the UGB agreement, all prior to filing this litigation. Plaintiffs Ex. 011, Plaintiffs Ex. 002, Plaintiffs Ex. 013, Plaintiffs Ex. 014, Plaintiffs Ex. 015, Plaintiffs Ex. 017, Plaintiffs Ex. 018, Plaintiffs Ex. 019, Plaintiffs Ex. 020, Plaintiffs Ex. 005.

II. OTHER RELEVANT MATERIAL FACTS WHICH ARE AT ISSUE

1. Both the Oregon land-use statutory scheme and Defendant City's Comprehensive Plan require the City to achieve a continuous five-year supply of billable land planned and zoned for all the City's needed housing. Plaintiffs' Ex. 008 at 6 (Sec. 71.05), Plaintiffs' Ex. 014 at 3. The Defendant City's repeated denials of the annexation of Plaintiffs' property caused the City to fail to meet requirements for needed housing and to maintain a continuous five-year supply. Plaintiffs' Ex. 014 at 6 ANX 3-97, Plaintiffs' Ex. 013 at 14 ANX 1-97, Plaintiffs' Ex. 040 at 39 (insufficient supply by year 2000), Plaintiffs' Ex. 040 at 32 (City forced to seek expansion of UGB by 900 acres after year 2000).

2. Edward J. Gormley has been the Mayor of Defendant City for the last 20 years (which includes all the time

that Plaintiffs have sought land-use approvals before Defendant City). Plaintiffs Ex. 043 Gormley Deposition at p. 4. The Mayor is a plumbing and heating business contractor since the 1970's and that he has a business relationship with Alan Ruden. The Mayor also had hired Mr. Ruden to construct the Mayor's new personal residence during the same approximate time that the Plaintiffs submitted their annexation request to the Defending City. Mr. Ruden is a developer of land in and around Defendant City since the 1980's. Plaintiffs Ex. 043 Gormley Deposition p. 24-27, Plaintiffs Ex. 046. A portion of the property belonging to Plaintiffs, that was repeatedly denied annexation while in the Plaintiffs' ownership, eventually was acquired by Mr. Ruden. This same property formerly owned by Plaintiffs was subsequently annexed into Defendant City by Mr. Ruden. Plaintiffs Ex. 043 Gormley Deposition at p. 21-23.

3. Plaintiffs originally sought their first annexation in application ANX 3-95 for 17.2 acres of land. The Mayor and the City Council members denied that annexation and required Plaintiffs to create a master land-use plan for Plaintiffs' in entire property before they would reconsider annexing any part of that property. Plaintiffs Ex. 004 at 1, Plaintiffs Ex. 041 Windle Deposition at p. 21. Plaintiffs were induced into delaying filing the annexation application by this disclosure by Defendant City. Jones Affidavit at p. 3. Defendant City became aware that an amendment to the City's Charter was being proposed that would require approval of annexations only through a vote of the City's citizens. Thereafter, the Mayor and City Council speeded favored annexation applications through to final approval just before the proposed charter amendment requiring citizen vote for annexations was ultimately

passed by the voters. Plaintiffs Ex. 030 at p. 1-3 (192.1 acres) on March 12, 1996, on May 14, 1996. Defendant City did not make this expedited annexation practice available to Plaintiffs, and the delay in Plaintiffs' annexation applications caused Plaintiffs' property to be subject to the new charter amendment requiring a vote of City's citizens. Plaintiffs Ex. 004, Jones Affidavit at p. 3.

4. Plaintiffs filed another annexation application (ANX 10-96) with Defendant City by July 11, 1996 seeking to annex 179.4 acres of land. However, the Defendant City passed a motion to continue review to a future but undisclosed date. ANX 10-96 was not expedited to annexation approval as Defendant City had done with other favored properties to be annexed.

5. Plaintiffs filed another annexation (ANX 1-97) for 171.6 acres of land. During the annexation proceedings, the McMinnville School District declared that it wanted to acquire approximately 10 acres of Plaintiffs land for a future school location by dedication and that Plaintiffs had not yet agreed to provide the School District with that acreage. Plaintiffs Ex. 018 at p. 19 and request by neighbor for "donation" at p. 12. On November 4, 1997, the citizens of Defendant City voted to deny this annexation. Plaintiffs Ex. 018 at 4.

6. Plaintiffs' next proposed annexations were ANX 3-97 for 78.2 acres and ANX 4-97 for 93.4 acres. On February 17, 1998 at the City Council hearing on the annexations, the Mayor advocated denying the northern portion of the property (ANX 3-97) and cast the deciding "tiebreaking" vote for denial. Plaintiffs Ex. 014 at p. 5.

7. In December of 1998, Plaintiffs submitted two more annexation applications to the City: ANX 6-98 for

93.4 acres and ANX 7-98 for 78.2 acres. The City's planning commission recommended approval of both annexation applications, but when the matter was presented before the City Council the City Council reduced the sizes of both annexations and remanded the matter back to the planning commission. Plaintiffs' Ex. 016 at 5-7 (ANX 6-98). This resulted in an inexplicable delay by the Defendant City and the Plaintiffs were not able to have a public hearing on their annexation requests until the next year when they were redefined by the City as ANX 1-99 and ANX 2-99. Plaintiffs' Ex. 018 at 15-18 (ANX 1-99), Plaintiffs' Ex. 019 at 14-19 (ANX 2-99). These relabeled annexations were eventually approved by the City Council and presented to the voters for approval. The voters denied both annexations in November of 1999. Plaintiffs' Ex. 018-019.

8. Thereafter, Plaintiffs submitted another annexation request (ANX 6-99) which reduced the annexation parcel size to only 65 acres. This was approved by the City Council on February 22, 2000, but was rejected by the voters on May 23, 2000. Plaintiffs' Ex. 020 (ANX 6-99).

9. Neither the ballot measures submitted to the voters that ultimately denied Plaintiffs' annexations nor the ordinance adopted by the Defendant City to implement the citizen vote on annexations include any "clear and objective standards" for the voters to make that decision. Plaintiffs Exs. 013 at 6, 015 at 4-5, 018 at 5-6, 019 at 4-5, 020 at 7-8; 031 at 1-3, Plaintiffs Ex. 040 Montgomery Deposition at p. 25; Plaintiffs Ex. 041 Windle Deposition at p. 17; Plaintiffs Ex. 042 Ross Deposition at p. 6. All of the Plaintiffs' annexation applications were denied by the voters of Defendant City without any findings supporting that denial that would

establish that the denial was based on standards or criteria.

10. Defendant City officials admit that the development plans by Plaintiffs for this same property were excellent. Plaintiffs Exs. 041 at 28 (a "fabulous" plan), 043 at 30-31(a "great vision"), 042 at 20-21 (the "finest piece of planning"). In direct contrast, the development plans by Alan Ruden were considered significantly inferior and the School District actually eliminated needed residential lands. Plaintiffs Exs. 043 at 30-31, 041 at 43.

11. In each of Plaintiffs applications for annexation the Defendant City adopted findings that the annexation applications satisfied all the city's and state's land-use requirements for approval. Plaintiffs' Ex. 011 at7-9 (ANX 3-95), Plaintiffs' Ex. 012 at 2-4 (ANX 10-96), Plaintiffs' Ex. 013 at 13-17 (ANX 1-97), Plaintiffs' Ex. 014 at 1-7 (ANX 3-97), Plaintiffs' Ex. 015 at 11-16 (ANX 4-97), Plaintiffs' Ex. 016 at 5-7 (ANX 6-98), Plaintiffs' Ex. 017 at 4-7 (ANX 7-98), Plaintiffs' Ex. 018 at 15-18 (ANX 1-99), Plaintiffs' Ex. 019 at 14-19 (ANX 2-99), Plaintiffs' Ex. 020 at 11-15 (ANX 6-99).

13. Defendant's City officials admit that the City had no reasonable or rational basis for denying Plaintiffs' annexation applications. Plaintiffs' Ex. 042 at 17-19 (City Attorney testifying that there were no defects to support denial); Plaintiffs' Ex. 041 Windle Deposition at p. 24-25 (City Council member had no doubts that the annexations should have been allowed), Plaintiffs' Ex. 041 Windle Deposition at p.41 lines 22-23 (there was "no compelling governmental reason" not to approve the Plaintiffs' annexations), Plaintiffs' Ex. 044 Schut Deposition at p. 40-41

(there was no "public health, safety or land use requirement that would have formed a sound basis for denial" of Plaintiffs' annexations).

Respectfully submitted this 9th day of January, 2005.

/s/ JOHN W. SHONKWILER, PC
John W. Shonkwiler
John W. Shonkwiler, OSB No.95337
Of Attorneys for Plaintiffs
(503) 624-0917

Why DLCD Supports Senate Bill 1137, To Prohibit City-Wide Votes on Annexations

The Department of Land Conservation and Development (DLCD) believes that requiring a city-wide vote to annex land already planned and zoned for urban development works against sound land use planning. For that reason, DLCD supports Senate Bill 1137, which does the following:

- Prohibits cities from adopting or enforcing charter provisions or ordinances that require submittal of proposed annexations to electors;
- Applies that prohibition to charter provisions or ordinances in effect since January 1, 1996;
- Provides that city councils make final determinations about annexation proposals;
- Requires city councils to adopt standards for approval of annexation proposals.

Why is DLCD concerned about city-wide votes on annexation proposals? The answers to that question are found in Oregon's statewide program for land use planning. That program is based on a simple but profound idea – that the state and its cities and counties should, as a matter of public policy, direct growth and development toward appropriate place. Generally, those "appropriate places" are urban areas – lands inside of urban grown boundaries. We direct growth toward urban areas for two main reasons.

One is cost-effectiveness. Cities are essentially factories that "manufacture" the complex and costly infrastructure and public services needed to serve modern development. It is more cost-effective to direct development to places where these service "factories" already exist than to continually expand them or build new ones to serve

sprawling, uncontrolled development. The other reason is conservation. We direct growth toward urban areas so we can conserve the rural farm lands, forest lands, coastal beaches, and other resources that are so essential to Oregon's economy and quality of life.

Under our planning system, all of our cities have drawn urban growth boundaries. Within those boundaries, they have planned and zoned a twenty-year supply of "urbanizable land" – areas where future growth and development will occur. These plans, boundaries, and zoning ordinances have been developed through an open public process. Moreover, they have been "coordinated." That is, cities, counties, special districts, and state agencies have cooperated to make their plans and policies fit together. For example, when a city draws its urban growth boundary, the surrounding county knows that land outside the boundary is not available for urban development, so it plans and zones the area for rural uses.

Annexation is one of several tools with which a city can create the type of community envisioned in the local comprehensive plan. In the language of planners, annexation is an "implementing measure." It is a device for carrying out policy already decided in the local planning process.

Referring each annexation proposal to a city-wide vote would make annexation an independent policy question, to be decided in isolation from and perhaps contrary to the comprehensive plan. It would make the annexation process a way of thwarting the comprehensive plan rather than a tool for implementing it, thus causing the problems described on the next page.

Department of Land Conservation and Development (DLCD)
1175 Court Street NE, Salem OR 96310
= 503 373-0050
MARCH 1997

First, votes against annexation are likely to increase sprawl and loss of farmland. If a city's voters use the annexation vote to block development inside the urban growth boundary, that will increase pressure for the development to go outside the boundary, onto farm or forest lands. City-wide annexations votes will not stop development. They will only drive it to other locations, where it is likely to bring greater harm to farms, forests and natural resources.

Second, anti-annexation votes may cause land to be used less efficiently. Suppose, for example, that a city's voters defeat a proposal to annex a fifty-acre parcel. Since the developer cannot get urban services like sewers and water, he therefore creates a rural residential subdivision of one-acre lots. The result is a sprawling development served by gravel roads, private wells, and septic tanks. Such development is a far less efficient use of land. It will cause some of the very problems that those who voted again annexation were concerned about.

Third, annexation votes would bypass a planning process in which Oregonians have invested a great deal of time, money, and energy. Requiring a vote on every annexation would create a system of "ballot-box planning" that would waste much of a community's investment in planning. Planning and zoning an area for urban growth become a useless exercise if an annexation vote a few years later can stop urban development in that area.

Fourth, annexation votes are likely to increase costs and litigation and reduce predictability for land owners, developers, and local governments. One of the main purposes of land use planning is to make the rules for development clear and predictable. With a good plan, everyone knows where development can and cannot go and where city services like sewers and streets will be needed. But submitting all annexation proposals to a city-wide vote conflicts works against that purpose. It makes it hard to know whether land in urban areas can ever be served or developed.

Fifth, annexation votes detract from the coordination that has been a central feature of Oregon's statewide planning program. Our 240 city plans, 36 county plans, and state agency programs have been coordinated with each other. One city knows how much and where a neighboring city plans to grow. But such coordination has little value if annexation votes can overturn those plans.

Consider, for example, what might happen if Bend and Redmond were to adopt a system of city-wide annexation votes. The development blocked in those two cities might very well spill into the City of Sisters, rendering its plan meaningless. Or consider how much unexpected development might be forced on Silverton and Dallas if Salem were to adopt a system of voting on annexations.

The annexation voting process has been described as a way to let people have a say in how their community will develop. But they already have that say. That's what Oregon's land use planning system is all about; it is a process for involving each community in long-range, coordinated decisions about land, natural resources, and public services.

Submitting each proposal for annexation to a city's voters will hinder, not help, our longstanding, well-tested system for sound local planning in Oregon. ❑

City of McMinnville

MEMORANDUM

DATE: January 3, 1996

TO: Mayor and City Council

FROM: Kent L. Taylor, City Manager /s/ [Illegible]

SUBJECT: Agenda Items for Regular Meeting of January 9, 1996

Audit Presentation: Please remember to bring your copy of the audit report to the meeting for use during the presentation by the auditor. If at the conclusion of the meeting you do not wish to keep your copy of the audit, staff will take it back. We can use them during the year for distribution to interested parties. There will always be a copy on file at City Hall for your future use and reference.

Item III-A: Continued discussion of a proposal to require a general vote of the public for all land annexations

At the December 19, 1995 dinner meeting, the Council received a request from three citizens for you to refer to the McMinnville voters their proposal to amend the City Charter. Their proposed City Charter amendment would require that all land annexation applications be referred to a vote of the general public. This proposal is patterned after the system that has been in place in Corvallis since the early 1970s, and more recently adopted in the City of Philomath.

The persons making the request indicated that if the Council did not refer the question themselves to the voters, they were prepared to circulate an initiative petition in order to get the question on the May 1996 ballot. This proposal is on the agenda for January 9, 1996 to allow interested persons to testify regarding the proposal and for the City Council to have more discussion. Enclosed is a memorandum from City Attorney Ross with regard to some of the legal and procedural issues involved and also a memorandum from Planning Director Rick Highsmith who outlines some of the land use planning policies and administrative questions involved with such a proposal.

The citizens making the request of the counsel have stated that this is not a growth versus no-growth issue but that they are concerned with negative impacts resulting from what they view as too high of annual growth rates over the past five years or so. If the objective with this measure is to slow growth, we have no evidence that this measure would accomplish that objective. Corvallis is the only city we can look to and there has been no "control city," i.e., a city exactly like Corvallis without such a system in place, with whom to compare its experience. While Corvallis' growth rate has been slower than McMinnville's, they are two very different communities in two different economic, political, social and geographic environments. One can argue that the market forces that have pushed up our rate of growth over the past five years or so do not exist in Corvallis and that with or without its charter provision on annexations, its growth rate would have been slower.

If the objective is to give the general public a more direct voice (or even the perception of the same) in the growth rate and development of their community, the proposal likely does this. But it also opens the door to a rejection of

valid annexation requests that comply with all land use plans because a segment of voters may not like certain housing types, e.g., apartments, manufactured housing, low and moderate income housing, etc. We have a state law that requires every city in the state to have its fair share of different land use types, including a variety of housing types.

The citizens making the request have not been specific as to what they see as specific problems with the current system of public hearings and review of annexation proposals by the Planning Commission and the City Council, their elected representatives (although there are some of the proponents of the measure who live outside the City). Again, the issue seems to come back to the rate of growth. The general question of growth rates and where growth should take place is more appropriately addressed in the legislative process now being undertaken by the Citizens' Advisory Committee, the Planning Commission and the City Council. They are reviewing land needs and UGB locations for the next 25 years. There are numerous opportunities for public input and participation in this process. It is also important to discuss growth rates in both the short and long term as pointed out in Rick's memorandum.

The question was asked by Councilor Windle at the dinner meeting about the growth rate assumptions included in our sewer revenue bond financing plan. The plan is based upon a very conservative projection. It assumes an annual growth rate in our customer base of only 2 percent.

Please refer to the memos from Rick and Clif for other considerations and thoughts about the proposal.

RECOMMENDATION: The Council should vote not to refer the proposed measure to the voters at this time.

City of McMinnville

MEMORANDUM

DATE: January 4, 1996

TO: Mayor and City Council

FROM: Richard M. Highsmith, III, Planning Director /s/ [Illegible]

SUBJECT: ANNEXATIONS

The City Manager asked that I address a memorandum to you regarding a request from several citizens that the Council refer to the voters a Charter amendment which would require that all future annexations be placed on the ballot. I had stated earlier that I would try to remain publicly neutral on the topic; however, that becomes exceedingly difficult once I start committing my thoughts to paper for public consumption. Be that as it may, I offer the following:

The Oregon land-use system works. It has been used as a model across the nation. It is certainly not perfect, but it is probably the fairest and least corrupt of all the nation's land-use systems because of the safeguards built in which protect all parties involved in a land-use decision. One of the problems with annexation by popular vote is that some of those safeguards would be removed. Annexations could, and probably would, become very political – in some cases

a popularity contest, and in the worst case, a form of racial or economic discrimination.

The way the system works now, annexations and subsequent rezoning and subdivision applications go through a high level of scrutiny and must meet specific clear and objective standards. This protects both the applicant, who knows going into a project what the rules and standards are, and the surrounding property owners, who know under what conditions the property can be developed. Once development proposals are required to gain the approval of the general public, it will be very difficult to adhere to a specific set of clear and objective standards.

Citizen involvement is the cornerstone of Oregon land-use law. Our comprehensive plans, which guide all development, are adopted only after exhaustive citizen input. Growth is directed into the urban areas, thereby protecting the resource lands. Land-use decisions are made at public meetings by community citizens, whom are guided by a strict set of standards. As I mentioned above, the Oregon land-use system works well. And the McMinnville land-use system works particularly well. Our growth is occurring where it is supposed to occur. Utilities are being extended in an efficient manner. Livability remains high. The perceived problem seems to be with the rate at which we are growing rather than with how we are growing.

One must remember that growth is cyclical in nature. In the late 1970's McMinnville was also growing at a rapid pace. Supply fell behind demand in the housing market, and housing prices skyrocketed. Public hearings planed before full houses as pro-growth, anti-growth, and slow-growth sentiments were heard. Planning Commission and City Council votes were frequently split. Then came the

1980's and a national recession. Growth nearly stopped. Housing prices actually fell (some of we poor suckers who bought homes in 1978 found that the market value of our homes was less than the mortgage payoff). Public hearings were no longer crowded, and council and commission votes were rarely split. The phrase of the day became "economic development," and the recruitment of new businesses became a primary goal.

Obviously, McMinnville survived the recession of the early and mid-1980's. The economy is now stronger than ever. Will this last forever? History tells us that it will not. This is why we use historical trending of 20 years or more when we do growth projections. Such a method takes into account the ups and downs which are always present in a community's population growth. One of my greatest fears is that if we artificially retard growth during a high-growth period, we force that growth into the unincorporated area of the county and into the small cities which do not have the infrastructure to handle it.

According to the Corvallis Planning Department, their annexation policy has rarely acted to deny an annexation. Rather, it has acted to delay annexations. Sometimes it might take three votes for an annexation to pass. As Corvallis holds annexation votes only on primary and general election dates, delays can reach up to two years in length. The costs of such delays, let alone the costs associated with the elections, do nothing positive in terms of housing costs in Corvallis. In addition, there are other up-front costs associated with the Corvallis system. Detailed design work must oftentimes be done before an annexation will be accepted by the voters. And there is no guarantee that the costs associated with the designs will be recouped.

Perhaps the most disturbing aspect of the Corvallis system is that development plans are reviewed by lay citizens rather than by professionals. One of the marks of McMinnville, its beauty and livability, is its design. The city's professionals have always worked hard on that aspect of development. Our reputation is one of being very demanding when it comes to design. I do not believe that the general public could do a better job on the specific design of individual projects.

In addition, the Corvallis system has never been tested in the courts as regards potential violation of the statewide planning goals. We are required by state law to maintain a five-year supply of land planned and zoned for all needed housing types. In addition statewide Goal No. 9 requires that we maintain a supply of land zoned for both commercial and industrial uses. If the supply of land in McMinnville is restricted because of annexation policy, we may well find ourselves open for lawsuits.

Finally, I haven't seen a groundswell of support for the proposed charter amendment. Public hearings on requests for annexation have been quite uneventful. The discussion of the city's recent growth is often heard about town. However, the topic of public votes on annexations is little discussed. The Council presently has the ability and authority to refer any and all annexations to a vote of the citizenry. I have heard no outcry that they should do so.

APPENDIX Q

James P. Martin, OSB No. 81306
E-mail: jpm@hhw.com
Kari A. Furnanz, OSB No. 96292
E-mail: kaf@hhw.com
HOFFMAN, HART & WAGNER, LLP
Twentieth Floor
1000 S.W. Broadway
Portland, Oregon 97205
Telephone: (503) 222-4499
Facsimile: (503) 222-2301

Of Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

DON JONES and VJ-2 DEVELOPMENT, INC., an Oregon corporation,

Plaintiffs,

v.

CITY OF MCMINNVILLE, an Oregon municipal corporation,

Defendant.

No. 04-00047-AA

DEFENDANT'S MOTION TO STRIKE

Oral Argument Requested

CERTIFICATE PURSUANT TO LOCAL RULE 7.1

Pursuant to Local Rule 7.1, defense counsel certifies that plaintiffs' counsel was contacted by telephone to confer about the subject matter of this motion. Defense counsel spoke to plaintiffs' counsel, Jeffrey Seymour, who indicated that his co-counsel, John Shonkwiler, should be contacted to confer. Defense counsel left two messages

with Mr. Shonkwiler, but was unable to speak with him prior to filing this motion.

MOTION

Defendant moves this court for an order striking portions of the exhibits submitted by plaintiffs in support of their motion for summary judgment. This motion is supported by the Memorandum in Support of Defendants' Motion to Strike and all of the documents on file herein.

This motion is made in good faith and without delay.

DATED this 28th day of January, 2005.

HOFFMAN, HART & WAGNER, LLP

By: /s/ Kari A. Furnanz
Kari A. Furnanz, OSB No. 96292
James P. Martin, OSB No. 81306
Of Attorneys for Defendant
(503)222-4499

James P. Martin, OSB No. 81306
E-mail: jpm@hhw.com
Kari A. Furnanz, OSB No. 96292
E-mail: kaf@hhw.com
HOFFMAN, HART & WAGNER, LLP
Twentieth Floor
1000 S.W. Broadway
Portland, Oregon 97205
Telephone: (503) 222-4499
Facsimile: (503) 222-2301

Of Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DON JONES and VJ-2 DEVELOPMENT, INC., an Oregon corporation,

Plaintiffs,

v.

CITY OF MCMINNVILLE, an Oregon municipal corporation,

Defendant.

No. 04-00047-AA

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO STRIKE

Defendant moves to strike portions of the evidence submitted by plaintiffs' in response to Defendant's Motion for Summary Judgment because the documents do not constitute admissible evidence. In particular, FRCP 56(c) provides:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and

> shall show affirmatively that the affiant is competent to testify to the matters stated therein."

(Emphasis added). Only admissible evidence may be considered by the court in ruling on a motion for summary judgment. *Keenan v. Allan*, 91 F.3d 1275, 1278 (9th Cir. 1996) (quoting FRCP 56(e)). For the reasons set forth below, the below-mentioned evidence is inadmissible and should be stricken from the record.

1. Statements in the Jones' Affidavit Which Contradict Prior Deposition Testimony.

The Ninth Circuit has long recognized that a party may not, without explanation, create an issue of fact precluding summary judgment by submitting an affidavit that conflicts with previous sworn testimony. *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 544 (9th Cir. 1975). "[I]f a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Id.* (quoting *Perma Research and Development Co. v. Singer Co.*, 410 F.2d 572, 578 (2nd Cir. 1969)). The Ninth Circuit has disregarded affidavits in opposition to a motion for summary judgment to the extent the affidavits are contrary to deposition testimony. *See Kennedy v. Allied Mutual Insurance Co.*, 952 F.2d 262, 266 (9th Cir. 1991). The Seventh Circuit has also criticized efforts to "retract," "explain away concessions," or "patch up" a party's deposition testimony with his or her own subsequent affidavit.

See Russell v. Acme-Evans Co., 51 F.3d 64, 67 (7th Cir. 1995).[1]

The following statements should be stricken from the record because, as indicated below, they contradict Mr. Jones' prior sworn deposition testimony:

A. The last sentence of the first paragraph of Section C on page 3, states that the City "wrongfully induced" plaintiffs into delaying the filing of their annexation application. However, in his deposition, Mr. Jones contradicted that statement when he testified as follows:

Q. What representatives of the City of McMinnville allegedly wrongfully induced you into delaying the filing of your annexation application?

A. Individuals.

Q. Individuals. You understand, because you have experience working for a government, that governmental agencies operate through individuals, correct?

A. And also collectively, correct.

Q. And I want to know what individuals allegedly wrongfully induced you into delaying submission of your application.

A. I would say the City Council.

Q. I want names, please. Specific individuals who allegedly induced you into delaying your application.

---

[1] Jones asserts that new items were learned during discovery which cause him to change his statements in his deposition. However, he does not change say what those new matters were and which answers he would have changed in his deposition.

A. Who – whoever was on the Council at that time.

Q. You have no names in your mind right now?

A. Well, I can remember some of the people that were on the Council, but it wouldn't be all-inclusive.

So . . .

Q. Tell me who said what to you that induced you to delay submission of your application.

A. Well, prior to the voter annexation at a Council meeting, and I was looking at doing the first phase of that development and was discussing annexation of the land, and because it was going through – the overall development plan was going through changes, the City Council asked if I would hold off on any annexation request until we had finalized that whole thing.

Q. Did you oppose that? Did you oppose that request?

A. No.

Q. Do you have any information or reason to believe that that request was made for any improper reason?

A. No.

Q. Do you have any knowledge, information, or evidence from which to conclude that request was made to delay the processing of your application until this amendment was passed?

A. No.

Q. You've told me the members of the City Council requested that you delay things until everything was final, right?

A. Yes.

Q. Is there any other individual connected to or representing or employed by the City that you would identify as having somehow wrongfully induced you to delay submission of your application?

A. Forgive me for taking a moment, because I'm trying to –

Q. Take all the time you need.

A. Following the same line of reasoning as with the City Council, I would say it would be Council only.

Q. The Council only?

A. Yeah.

* * *

Q. In what way, in your mind, did the City of McMinnville wrongfully induce you into delaying the filing of your annexation?

A. I think I just answered it a few minutes ago.

Q. What was wrong about it?

A. Well, I – I think asking me to delay it, and then the net result of me delaying it, trying to work with them, created a wrong.

Q. But you don't have any reason to believe the City intentionally tried to create harm for you or cause you harm, correct?

A. No.

Q. You have no basis on which to conclude the City tried to encourage you to delay, hoping that this amendment would pass and, therefore, your annexation not be approved by the voters, correct?

A. (No response.)

Q. That's a correct statement, right? You have no reason to believe that?

A. That's correct.

Ex. A, Jones Depo., p. 16, l. 7 – p. 17, l. 12; p. 19, ll. 2-21 (emphasis added).

B. In paragraph C on page 3, on two occasions Mr. Jones states that the 1996 Charter Amendment was passed with "Defendant's support" implying that the City was involved in passing the Amendment and that it was targeted at him. In Jones' deposition, he testified as follows:

Q. What information do you have to suggest, in your mind, that that amendment was passed to somehow harm you?

A. It has.

Q. It has?

A. Yes.

Q. Before it was passed, before it became the law there, do you have any information or evidence to suggest that it was proposed and passed for the reason of harming you?

A. No.

Q. Did you do anything to oppose the passage of that ordinance or charter amendment?

A. No.

Q. Did you do anything, on any occasion when you were proposing your annexation, to encourage the voters to approve your proposal?

A. Yes.

Ex. A, Jones Depo., p. 11, l. 25 – 12, l. 17.

2. Lack of Personal Knowledge.

An affiant's statement does not raise a triable issue of fact when it is simply based on "information and belief" rather than personal knowledge. *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1529 (9th Cir. 1991), *aff'd* 508 U.S. 49 (1993); *Taylor v. List,* 880 F.2d 1040, 1045 n.3 (9th Cir. 1989); *see also* FRE 602 ("a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter"). The following sections of the affidavit of Don Jones should be stricken because they are not based upon his personal knowledge:

A. In Section 5 on page 6, Mr. Jones indicates that the City Council "did not expedite or otherwise review" his application. He provides no foundation demonstrating that he has personal knowledge of facts to support this statement.

B. In paragraph C on page 3, Mr. Jones states that "citizens of and near the defendant obtained the defendant's support to adopt a City Charter Amendment . . . " However, the affidavit provides no information as to whether Mr. Jones knew who these citizens were and how anyone at the City allegedly "supported" the adoption of the Amendment.

C. The entire section F on page 5 contains numerous conclusory statements and legal conclusions without any factual support and should be stricken.

D. The entire section G on page 6 contains numerous conclusory statements and legal conclusions without any factual support and should be stricken. In particular, plaintiffs have not articulated how defendant allegedly "intentionally and continuously failed to take actions that would have mitigated or otherwise reduced plaintiffs' damages."

3. Conclusory Statements.

Almost the entire affidavit submitted by Mr. Jones appears to have been taken directly from the allegations in his Complaint and includes virtually no factual support for the statements that are made. Accordingly, it cannot be used to defeat summary judgment. To avoid summary judgment, a litigant must provide evidentiary facts, not conclusory statements. "[A] party to a lawsuit cannot ward off summary judgment with an affidavit . . . based on rumor or conjecture." *Palucki v. Sears, Roebuck & Co.*, 879 F.2d 1568, 1572 (7th Cir. 1989). The United States Supreme Court has addressed these issues as follows:

> "(T)he purpose of Rule 56 is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other side's case to demand at least one sworn statement of that fact before the lengthy process of litigation continues."

Lujan v. Nat'l Wildlife Fed., 497 U.S. 871, 889 (1990). *See also National Steel Corp. v. Golden Eagle Ins. Co.*, 121 F.3d 496, 502 (9th Cir. 1997) ("conclusory allegations of collusion, without factual support, are insufficient to defeat summary judgment"). Therefore, the entirety of Mr. Jones' affidavit is not sufficient to overcome the evidence submitted by defendant in support of its Motion for Summary Judgment.

More specifically, the following references most clearly constitute conclusory statements and should be stricken from the record:

A. In paragraph C on page 3, Mr. Jones states that "citizens of and near the defendant obtained the defendant's support to adopt a City Charter Amendment . . . " However, the affidavit provides no information as to who these citizens were and how anyone at the City allegedly "supported" the adoption of the Amendment.

B. Section C on page 3 also states that "defendant wrongfully induced plaintiffs into delaying filing plaintiffs' annexation application to the defendant." Again, the affidavit fails to specify the facts to describe how the City "wrongfully induced" him.

C. Section D on page 4 includes a statement that "plaintiffs relied upon the encouragement and assurances of the defendant." However, there is no elaboration as to what "encouragement and assurances" were provided.

D. The entire section F on page 5 contains numerous conclusory statements and legal conclusions without any factual support and should be stricken.

E. The entire section G on page 6 contains numerous conclusory statements and legal conclusions without any factual support and should be stricken. In particular, plaintiffs have not articulated how defendant allegedly "intentionally and continuously failed to take actions that would have mitigated or otherwise reduced plaintiffs' damages."

4. Irrelevant/Lack of Proper Authentication.

Plaintiffs' Exhibit 46 purports to be a copy of an Amended Complaint filed by Mayor Edward Gormley against Alan Ruden. However, the submissions received by defense counsel contain only the first page of this Amended Complaint. As well, it is unclear how this transaction between Mr. Gormley and Mr. Ruden (which occurred in 1995), bears any relevance to this case. Plaintiffs attempt to use innuendo and speculation should be disregarded.

5. Hearsay.

Paragraph G on page 5 of the Don Jones' Affidavit and references in Plaintiffs' Memorandum to damages are hearsay and should be stricken. Additionally, the document cited by plaintiffs to prove Don Jones' ownership (Ex. 19) is hearsay and should be stricken.

DATED this 28th day of January, 2005.

HOFFMAN, HART & WAGNER, LLP

By: /s/ Kari A. Furnanz
Kari A. Furnanz, OSB No. 96292
James P. Martin, OSB No. 81306
Of Attorneys for Defendant
(503)222-4499

APPENDIX R

APPEAL, PARTCONS, TERMINATED

U.S. District Court
District of Oregon (Eugene)
CIVIL DOCKET FOR CASE #: 6:04-cv-00047-AA

Jones et al v. City of McMinnville
Assigned to: Judge Ann L. Aiken
Demand: $58000000
Case in other court: Yamhill County, CV 030428
Cause: 15:1 Antitrust Litigation

Date Filed: 01/14/2004
Jury Demand: Defendant
Nature of Suit: 290 Real Property: Other
Jurisdiction: Federal Question

Plaintiff

Don Jones represented by **Jeffrey S. Seymour**
4040 Douglas Way
P.O. Box 1708
Lake Oswego, OR 97035
(503) 635-9393 x112
Fax: (503) 697-5958
Email: jeffseymour1 @earthlink.net
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

John W. Shonkwiler
John W. Shonkwiler, PC
13425 SW 72nd Avenue
Tigard, OR 97223
(503) 624-0917
Fax: (503) 684-8971
Email: johnshonkwiler @yahoo.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

VJ-2 Development, Inc. *an Oregon Corporation*	represented by	**Jeffrey S. Seymour** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED* **John W. Shonkwiler** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

V.

Defendant

City of McMinnville *an Oregon municipal corporation*	represented by	**James P. Martin** Hoffman Hart & Wagner, LLP 1000 SW Broadway 20th Floor Portland, OR 97205 (503) 222-4499 Fax: (503) 222-2301 Email: jpm@hhw.com *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED* **Kari A. Furnanz** Hoffman Hart & Wagner, LLP 1000 SW Broadway 20th Floor Portland, OR 97205 (503) 222-4499 Fax: (503) 222-2301 Email: kaf@hhw.com *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

Date Filed	#	Docket Text
01/14/2004	1	Notice of Removal. Filing Fee collected. Receipt #: 171794 issued. Filed by City of McMinnville against City of McMinnville. (pvh,) (Entered: 01/16/2004)
01/14/2004	2	Discovery and Pretrial Scheduling Order and Notice of Case Assignment: Case assigned to the Honorable Ann L. Aiken. Discovery to be completed by 5/13/2004. Joint Alternate Dispute Resolution Report due by 6/14/2004. Pretrial Order due by 6/14/2004. (pvh,) (Entered: 01/16/2004)
01/20/2004	4	Motion to Remand *(Request for Oral Argument).* Filed by Don Jones, VJ-2 Development, Inc.. (cp,) (Entered: 01/22/2004)
01/20/2004	5	Memorandum in Support *of Motion to Remand.* Filed by Don Jones, VJ-2 Development, Inc.. (Related document(s)*4*) (cp,) (Entered: 01/22/2004)
01/20/2004	6	Affidavit of *John W. Shonkwiler.* Filed by Don Jones, VJ-2 Development, Inc.. (Related document(s)*4*) (cp,) (Entered: 01/22/2004)
01/20/2004	7	Certificate of Service of Notice to Adverse Party of Notice of Removal to Federal Court. Filed by City of McMinnville (Related document(s)*1*) (cp,) Modified on 1/29/2004 to correct filer of certificate(cp,). (Entered: 01/22/2004)
01/21/2004	3	Motion for Extension of Time to Answer. Filed by City of McMinnville. (Furnanz, Kari) (Entered: 01/21/2004)
01/26/2004	8	**ORDER:** Record of Order Granting Defendant's Unopposed Motion for Extension of

Time to 2/4/04 to File a First Appearance (Related Doc #3). by Judge Ann Aiken. (lae,) (Entered: 01/26/2004)

02/02/2004 9 Motion for Extension of Time to File a Response/Reply to Motion # *4. to Remand.* Filed by City of McMinnville. (Furnanz, Kari) (Entered: 02/02/2004)

02/02/2004 10 Affidavit of *Tonya K. Cuellar in Support of Defendant's Motion for Extension of Time to File Response to Motion to Remand.* Filed by City of McMinnville. (Related document(s)*9*) (Furnanz, Kari) (Entered: 02/02/2004)

02/03/2004 11 Fed. R. Civ. P. 26(a)(1) Agreement Filed by Don Jones. (cp,) (Entered: 02/04/2004)

02/04/2004 12 Answer, *Affirmative Defenses and Counterclaim of Defendant* (Related Doc #*1*). Filed by City of McMinnville. (Furnanz, Kari) (Entered: 02/04/2004)

02/05/2004 13 Certificate of Service. Filed by City of McMinnville. (Related document(s)*9*) (Furnanz, Kari) (Entered: 02/05/2004)

02/09/2004 14 **ORDER:** Record of Order Granting Defendant's Motion (#*9*) for Extension of Time to File Response to Motion to Remand #*4*. Response due by 2/13/2004. Plaintiffs Motion to Remand taken under advisement as of 3/1/2004. by Judge Ann Aiken. (Related documents(s) *4*) (lae,) (Entered: 02/09/2004)

02/13/2004 15 Response to Motion *Response to Plaintiff's Motion to Remand.* Filed by City of McMinnville. (Related motion(s)*4*) (Furnanz, Kari) (Entered: 02/13/2004)

02/13/2004 16 Affidavit of *Kari A. Furnanz*. Filed by City of McMinnville. (Related document(s)*15*) (Furnanz, Kari) (Entered: 02/13/2004)

02/19/2004 17 Reply to Motion *to Remand*. Filed by Don Jones, VJ-2 Development, Inc.. (Related motion(s)*4*) (cp,) (Entered: 02/24/2004)

02/19/2004 18 Affidavit of *John W. Shorkwiler*. Filed by Don Jones, VJ-2 Development, Inc.. (Related document(s)*17*) (cp,) (Entered: 02/24/2004)

04/20/2004 19 **ORDER:** Plaintiffs Motion to Remand and request for fees *4* is denied. Plaintiffs' federal taking claim asserted pursuant to the Fifth Amendment is hereby Dismissed Without Prejudice. Signed on April 20, 2004 by Judge Ann L. Aiken. (cp,) (Entered: 04/20/2004)

04/22/2004 20 Supplemental Citations for Motion for Remand. Filed by Don Jones, VJ-2 Development, Inc.. (Related document(s):*4*)(cp,) (Entered: 04/22/2004)

05/14/2004 21 Unopposed Motion for Extension of Discovery & PTO Deadlines. Filed by City of McMinnville. (Furnanz, Kari) (Entered: 05/14/2004)

05/17/2004 22 **ORDER:** Record of Order by Judge Ann L. Aiken: Granting Defendants' Unopposed Motion for Extension of Discovery & Dispositive Motion Deadlines *21*. Discovery to be completed and experts disclosed by 9/13/2004. Joint Alternate Dispute Resolution Report due by 10/13/2004. Pretrial Order due by 10/13/2004. Dispositive Motions due by 9/13/2004. (lae,) (Entered: 05/17/2004)

09/13/2004 23 Motion for Extension of Discovery & PTO Deadlines. Filed by City of McMinnville. (Furnanz, Kari) (Entered: 09/13/2004)

09/13/2004 24 Affidavit of Kari A. Furnanz in Support of Motion *to Extend Discovery and Dispositive Motion Deadlines.* Filed by City of McMinnville. (Related document(s): Motion for Extension of Discovery & PTO Deadlines*23*.) (Furnanz, Kari) (Entered: 09/13/2004)

09/14/2004 25 **ORDER:** Record of Order by Judge Ann L. Aiken: Granting Defendant's Motion to Extend Discovery and Dispositive Motion Deadlines *23*. Discovery to be completed and experts disclosed by 10/15/2004. Joint Alternate Dispute Resolution Report due by 11/15/2004. Pretrial Order due by 11/15/2004. Dispositive Motions due by 10/15/2004. (lae,) (Entered: 09/14/2004)

09/30/2004 26 Motion for Extension of Discovery & PTO Deadlines. Filed by all plaintiffs. (Attachments: *#1*) (Shonkwiler, John) (Entered: 09/30/2004)

10/01/2004 27 Response to Motion for Extension of Discovery & PTO Deadlines*26*. Filed by City of McMinnville.(Furnanz, Kari) (Entered: 10/01/2004)

10/05/2004 28 **ORDER:** Record of Order by Judge Ann L. Aiken: Granting Plaintiffs' Unopposed Motion to Extend Discovery and Dispositive Motion Deadlines *26* to the extent that Discovery shall be completed and experts disclosed by 12/15/2004. Joint Alternate Dispute Resolution Report due by 1/31/2005. Pretrial Order due by

1/31/2005. Dispositive Motions due by 12/15/2004. (lae,) (Entered: 10/05/2004)

12/13/2004 29 Unopposed Motion for Extension of Time *to Extend Discovery and Dispositive Motion Deadlines.* Filed by City of McMinnville. (Furnanz, Kari) (Entered: 12/13/2004)

12/13/2004 30 Affidavit in Support of Motion. Filed by City of McMinnville. (Related document(s): Motion for Extension of Time*29.*) (Furnanz, Kari) (Entered: 12/13/2004)

12/14/2004 31 **ORDER:** Record of Order by Judge Ann L. Aiken: Granting Defendant's Unopposed Motion to Extend Discovery and Dispositive Motion Deadlines *29.* Discovery to be completed and experts disclosed by 12/29/2004. Dispositive Motions due by 12/29/2004. (lae,) (Entered: 12/14/2004)

12/29/2004 32 Motion for Summary Judgment *Pursuant to FRCP 56.* Filed by all defendants. (Furnanz, Kari) (Entered: 12/29/2004)

12/29/2004 33 Affidavit in Support of Motion *Kent Taylor.* Filed by all defendants. (Related document(s): Motion for Summary Judgment*32.*) (Furnanz, Kari) (Entered: 12/29/2004)

12/29/2004 34 Affidavit of Amy Buckler in Support of Motion *for Summary Judgment.* Filed by all defendants. (Related document(s): Motion for Summary Judgment*32.*) (Furnanz, Kari) (Entered: 12/29/2004)

12/29/2004 35 Affidavit of Kari Furnanz in Support of Motion *for Summary Judgment.* Filed by all defendants. (Related document(s): Motion for Summary Judgment*32.*) (Furnanz, Kari) (Entered: 12/29/2004)

12/29/2004 36 Affidavit of Douglas Montgomery in Support of Motion *for Summary Judgment.* Filed by all defendants. (Related document(s): Motion for Summary Judgment*32.*) (Furnanz, Kari) (Entered: 12/29/2004)

12/29/2004 37 Concise Statement of Material Fact. Filed by City of McMinnville. (Related document(s): Motion for Summary Judgment*32.*) (Furnanz, Kari) (Entered: 12/29/2004)

12/29/2004 38 Memorandum in Support *of Defendant's Motion for Summary Judgment.* Filed by City of McMinnville. (Related document(s): Motion for Summary Judgment*32.*) (Furnanz, Kari) (Entered: 12/29/2004)

12/30/2004 39 Disclosure of Expert Witnesses. Filed by Don Jones, VJ-2 Development, Inc..(cp,) (Entered: 01/03/2005)

01/11/2005 40 Memorandum in Opposition to Motion for Summary Judgment *Pursuant to FRCP 56 32.* Filed by Don Jones(cp,) (Entered: 01/12/2005)

01/11/2005 41 Affidavit of John W. Shonkwiler. Filed by Don Jones. (Related document(s): Memorandum in Opposition*40*) (cp,) (Entered: 01/12/2005)

01/11/2005 42 Affidavit of Don Jones. Filed by Don Jones. (Related document(s): Memorandum in Opposition*40*) (cp,) (Entered: 01/12/2005)

01/11/2005 43 Response. Filed by Don Jones, VJ-2 Development, Inc. (Related document(s): Concise Statement of Material Fact*37*) (cp,) (Entered: 01/12/2005)

01/24/2005 44 Unopposed Motion for Extension of Time *to File Reply in Support of Motion for Summary Judgment.* Filed by City of McMinnville. (Furnanz, Kari) (Entered: 01/24/2005)

01/24/2005 45 Affidavit of Kari A. Furnanz in Support of Motion *to Extend Time for Filing Reply in Support of Motion for Summary Judgment.* Filed by City of McMinnville. (Related document(s): Motion for Extension of Time*44.*) (Furnanz, Kari) (Entered: 01/24/2005)

01/25/2005 46 **ORDER:** Record of Order by Judge Ann L. Aiken: Granting Defendant's Unopposed Motion to Extend Time for Filing Reply in Support of Motion for Summary Judgment *44.* Reply due by 1/28/2005 for Defendant's Motion for Summary Judgment *32.* (lae,) (Entered: 01/25/2005)

01/28/2005 47 Reply *in Support* to Motion for Summary Judgment *Pursuant to FRCP 56 32.* Filed by City of McMinnville. (Furnanz, Kari) (Entered: 01/28/2005)

01/28/2005 48 Motion to Strike. Filed by City of McMinnville. (Furnanz, Kari) (Entered: 01/28/2005)

01/28/2005 49 Memorandum in Support *of Defendant's Motion to Strike.* Filed by City of McMinnville. (Related document(s): Motion to Strike*48.*) (Furnanz, Kari) (Entered: 01/28/2005)

01/28/2005 50 Reply *to Plaintiffs' Response to Defendant's Concise Statement of Materials Facts.* Filed by City of McMinnville. (Furnanz, Kari) (Entered: 01/28/2005)

01/28/2005 51 Affidavit of Douglas Montgomery *in Support of Reply to Plaintiffs' Response to Defendant's Concise Statement of Material Facts.* Filed by City of McMinnville. (Furnanz, Kari) (Entered: 01/28/2005)

02/03/2005 52 Memorandum in Opposition to Motion to Strike*48*. Filed by Don Jones, VJ-2 Development, Inc.(cp,) (Entered: 02/03/2005)

02/09/2005 53 **CIVIL MINUTES: Record of** Order by Ann L. Aiken: Pursuant to defendant's letter to the court dated 2/7/05, the date for lodging the pretrial order and filing the joint ADR report is extended to 30 days following the court's ruling on defendant's motion for summary judgment and motion to strike. Ordered by Judge Ann L. Aiken. (lae,) (Entered: 02/09/2005)

02/14/2005 54 Reply *in Support* to Motion to Strike*48*. Filed by City of McMinnville.(Furnanz, Kari) (Entered: 02/14/2005)

03/07/2005 55 **CIVIL MINUTES: Record of** Order by Ann L. Aiken: Oral Argument set for 3/31/2005 at 10:00AM by Telephone on Defendants' Motion for Summary Judgment *32* and Defendant City of McMinnville's Motion to Strike*48*. The court will initiate the call. Ordered by Judge Ann L. Aiken. (lae,) (Entered: 03/07/2005)

03/16/2005 56 **CIVIL MINUTES: Record of** Order by Ann L. Aiken: Oral Argument reset on Defendants' Motion for Summary Judgment *32* and Defendant City of McMinnville's Motion to Strike*48* from 3/31/05 to 4/12/2005 at 10:30AM by Telephone. The court will initiate the call. Ordered by

Judge Ann L. Aiken. (lae,) (Entered: 03/16/2005)

04/12/2005 57 **CIVIL MINUTES: Record of Proceedings:** Telephone Motion Hearing held 4/12/05. Ordered Defendants' Motion for Summary Judgment*32* and Defendant City of McMinnville's Motion to Strike*48* taken under advisement as of 4/12/2005. John Shonkwiler present as counsel for plaintiffs. Kari Furnanz present as counsel for defendants. Court Reporter: Kristi Anderson. Ann L. Aiken presiding. (lae,) (Entered: 04/12/2005)

04/25/2005 58 **ORDER:** Defendant's Motion for Summary Judgment *32* and Motion to Strike *48* are Granted and this case is dismissed. Signed on April 25, 2005 by Judge Ann L. Aiken. (cp,) (Entered: 04/27/2005)

04/27/2005 59 Judgment: This action is dismissed. Signed April 27, 2005 by Deputy Clerk, C. Pew. (cp,) (Entered: 04/27/2005)

05/11/2005 60 Bill of Costs. Filed by City of McMinnville. (Furnanz, Kari) (Entered: 05/11/2005)

05/11/2005 61 Memorandum in Support *of the Cost Bill of Defendant City of McMinnville.* Filed by City of McMinnville. (Related document(s): Bill of Costs*60*.) (Furnanz, Kari) (Entered: 05/11/2005)

05/11/2005 62 Affidavit of Kari A. Furnanz in Support of Motion *Cost Bill of Defendant City of McMinnville.* Filed by City of McMinnville. (Related document(s): Bill of Costs*60*.) (Furnanz, Kari) (Entered: 05/11/2005

05/23/2005 63 Notice of Appeal to the 9th Circuit from Judgment*59*. Filing fee in amount of

		$255.00 collected; Receipt No. 3550 issued. Filed by Don Jones, VJ-2 Development, Inc. Transcript Designation due by 7/22/2005. (cp,) (Entered: 05/25/2005)
05/23/2005	64	Representation Statement re Notice of Appeal*63*. Filed by Don Jones, VJ-2 Development, Inc. (cp,) (Entered: 05/25/2005)

FILED
AUG 24 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-146

In the Supreme Court of the United States

DON JONES; VJ-2 DEVELOPMENT, INC.,
an Oregon corporation,
Petitioners,

v.

CITY OF McMINNVILLE, OREGON,
an Oregon municipal corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

JANET M. SCHROER
Counsel of Record
HOFFMAN, HART & WAGNER, LLP
1000 S.W. BROADWAY
SUITE 2000
PORTLAND, OR 97205
(503) 222-4499

Counsel for Respondent
City of McMinnville

August 24, 2007

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

I. STATEMENT OF THE CASE 1

II. REASONS FOR DENYING CERTIORARI 6

A. The Ninth Circuit's Inverse Condemnation Ruling Presents No Basis For Review By This Court . . 6

B. Even If Review Of The Inverse Condemnation Ruling Were Appropriate, The Ninth Circuit's Application Of Oregon Law Was Correct 7

C. The Ninth Circuit's Equal Protection Ruling Presents No Basis For Review By This Court . . 8

1. Petitioners Failed To Preserve Their Statute of Limitations Argument 8

2. Even If Preserved, Petitioners' Statute Of Limitations Argument Lacks Merit 9

3. Petitioners' "Class Of One Argument" Includes An Incorrect Recital Of The District Courts' Ruling And Presents Nothing For This Court To Review 10

D. The Ninth Circuit's Due Process Ruling Presents No Basis For Review By This Court 11

1. Petitioners Failed To Preserve Their Statute of Limitations Argument 11

2. Even If Preserved, Petitioners' Statute Of Limitations Argument Lacks Merit 12

3. Petitioners Failed To Preserve Their Argument That They Are Entitled To Bring A Due Process Claim In Addition To Their Equal Protection And Takings Claims 12

4. Even If Preserved, Petitioners' Argument On Their Entitlement To Bring A Due Process Claim Presents No "Conflict" With This Court's Jurisprudence And Is Based Upon A Misreading Of The Ninth Circuit's Opinion . 12

5. Petitioners' Arguments On The Merits Of Their Due Process Claim Do Not Belong Before This Court 14

E. The Ninth Circuit's Antitrust Ruling Presents No Basis For Review By This Court 15

1. The Ninth Circuit Did Not Misconstrue The Necessary Elements For State Action Immunity 15

2. Petitioners' "Sham" Argument Presents No Important Federal Question For Review By This Court 17

F. The Ninth Circuit's Rulings On Petitioners' Remand and Abstention Motions Present No Basis For Review By This Court 18

1. The Ninth Circuit's Decision On The Motion For Remand Presents No Question Of Interest Beyond This Case 18

2. Even If The Remand Ruling Were Appropriate For Review, The Case That Petitioners Cite As Conflicting With The Ninth Circuit's Decision Was Not Raised Below And Does Not support Petitioners' Position. In Any Event, Petitioners Challenge A Non-Essential Portion Of The Ninth Circuit's Ruling 18

3. Petitioners' Additional Arguments Raise Nothing For This Court's Consideration 20

4. An Abstention Ruling Is Not A Proper Subject For Supreme Court Review 21

5. Even If The Abstention Ruling Were Appropriate For Review, There Was No Basis For Abstention In This Case 21

III. CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Bear Creek Valley Sanitary Auth. v. City of Medford,
130 Or. App.24, 880 P.2d 486,
rev. den. 320 Or. 493 (1994) 15, 22

Buckles v. King County,
191 F.3d 1127 (9th Cir 1999) 13

Cape v. City of Beaverton,
187 Or. App. 463, 68 P.3d 261 (2003) 22

City of Columbia v. Omni Outdoor Advertising, Inc.,
499 U.S. 365, 111 S. Ct. 1344,
113 L. Ed. 2d 382 (1991) 18

City of Monterey v. Del Monte Dunes at Monterey, Ltd.,
526 U.S. 687, 119 S. Ct. 1624,
143 L. Ed. 2d 882 (1999) 20

Dan Gile and Associates v. McIver,
113 Or. App.1, 831 P.2d 1024 (1992) 15, 22

Daniels v. Williams,
474 U.S. 327, 106 S. Ct. 662,
88 L. Ed. 2d 662 (1986) 19

Dunn v. City of Redmond,
303 Or. 201, 735 P.2d 609 (1987) 7

Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.,
365 U.S. 127, 81 S. Ct. 523,
5 L. Ed. 2d 464 (1961) 17

Medo-Bel Creamery v. State of Oregon,
65 Or App. 614, 673 P.2d 537 (1983) 9

Palazzolo v. Rhode Island,
533 U.S. 606, 121 S. Ct. 2448,
150 L. Ed. 2d 592 (2001) 20

Parratt v. Taylor,
451 U.S. 527, 101 S. Ct. 1908,
68 L. Ed. 2d 420 (1981) 19, 20

Rolf v. City of San Antonio,
77 F.3d 823 (5th Cir. 1996) 13

Sanok v. Grimes,
306 Or. 259, 760 P.2d 228 (1988) 9

Schoonover v. Klamath County,
105 Or. App. 611, 806 P.2d 156,
rev. den., 311 Or. 432 (1991) 7

State v. Clark,
291 Or. 231, 630 P.2d 810,
cert. den., 454 U.S. 1084 (1981) 11

Suess Builders Co. v. City of Beaverton,
294 Or. 254, 656 P.2d 306 (1982) 9

Suitum v. Tahoe Regional Planning Agency,
520 U.S. 725, 117 S. Ct. 1659,
137 L. Ed. 2d 980 (1997) 20

Town of Hallie v. City of Eau Claire,
471 U.S. 34, 105 S. Ct. 1713,
85 L. Ed. 2d 24 (1985) 15, 16, 17

Traweek v. City and County of San Francisco,
920 F.2d 589 (9th Cir.1990) 18

United States v. Johnston,
268 U.S. 220, 45 S. Ct. 496, 69 L. Ed. 925 (1925) . 1

Village of Willowbrook v. Olech,
528 U.S. 562, 120 S. Ct. 1073,
145 L. Ed. 2d 1060 (2000) 11

Watt v. Alaska,
451 U.S. 259, 101 S. Ct. 1673,
68 L. Ed.2d 80 (1981) 6

Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City,
473 U.S. 172, 105 S. Ct. 3108,
87 L. Ed. 2d 126 (1985) 13, 19, 20, 21

Statutes

Sup. Ct. R. 10 . . . . . *passim*

Or. Const. Art. I, §18 6

OR. REV. STAT. § 30.275(9) 9

Respondent City of McMinnville ("the City") respectfully requests that this Court deny the petition for certiorari ("petition") filed by petitioners Don Jones and VJ-2 Development, Inc., seeking review of the unpublished opinion of the Ninth Circuit Court of Appeals entered in this case on May 9, 2007.

This case is unsuitable for review because petitioners' arguments amount to nothing more than a quarrel with the outcome in this case. The case presents no important federal question for resolution by this Court. Sup. CT. R. 10. In addition, petitioners misstate the facts in several regards and rely upon unpreserved arguments.

I. STATEMENT OF THE CASE

The unsuitability of this case for Supreme Court review is apparent from petitioners' seven-page factual recital, presented at pages three through nine of their petition under the heading "The Case." This Court has long made clear that it does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227, 45 S. Ct. 496, 497, 69 L. Ed. 925 (1925).

Although the City understands that this Court is not in the business of reviewing facts, petitioners' recital presents a false picture of this case and requires correction. The City objects to petitioners' statement of facts to the extent that it relies upon the affidavit of Don Jones. (App. 166-172).[1] The

---

[1] References to "App." are to the appendix attached to the petition for certiorari. References to "E.R." and "S.E.R." are to petitioners' excerpt of record and the City's supplemental excerpt of record filed with their Ninth Circuit Briefs. References to "C.D." are to the clerk's docket.

district court granted the City's motion to strike most of that affidavit on evidentiary grounds (App. 25, 320-328), and the Ninth Circuit Court of Appeals upheld this ruling. (App. 6). Petitioners do not challenge that ruling here.

Further, much of petitioners' statement of facts relies upon petitioners' concise statement of material facts. (App. 296-305). Most of that document, however, was contested or objected to by the City. (C.D. 50). For instance, petitioners assert that "the Mayor and City Council speeded other similarly situated annexation applications through to final approval just before" passage of the charter amendment requiring citizen approval of annexations. (Pet. 6). To the contrary, the City's response to petitioners' concise statement cites evidence that all applicants were treated the same and points out that the exhibits relied upon by petitioners do not support their position. (C.D. 50, p. 4). The City adopts and relies upon its responses and objections to petitioners' concise statement of material fact in so far as they are relevant to petitioners' statement of the case.

The City disagrees with the characterizations in the first paragraph of petitioners' statement of the case. (Pet. 3). The City acknowledges that both the Planning Commission and the City Council approved each of petitioners' annexation requests. The City, however, does not now agree and has not previously agreed that petitioners were "wronged." Petitioners' requests were simply denied by a legal vote of the City's citizens.

Following is a recital of the facts relevant to petitioners' arguments.

Pursuant to the City's Urban Growth Boundary Management Agreement ("UGB Agreement") with Yamhill

County, development of urban uses on lands designated Future Urbanizable Land must be preceded by annexation of the land to the City, and annexations are to occur in accordance with the City's Comprehensive plan and the procedures set out in the City's annexation ordinance. (S.E.R. 41).

On May 21, 1996, the citizens of McMinnville passed a ballot measure directing that the City Charter be amended to require that all annexations of land to the City, except those required by state law, be approved by a majority of City voters. (S.E.R. 60). The charter amendment was initiated and promoted by a local land use group, which began its signature campaign after the City declined the group's request that the City pass an ordinance amending the charter. (S.E.R. 35). There is no evidence that the City supported the initiative campaign.

Petitioner Jones acknowledges that petitioners have no evidence that the Charter amendment was proposed and passed in order to harm them or to establish that the Charter amendment was related to their proposed annexations or intended to prevent them from developing the subject property. (App. 162; S.E.R 14, 18). Jones' only basis for his conclusion that the passage of the Charter amendment was a pattern or practice of the City to harm him was the fact that he was harmed. (S.E.R. 14).

After the ballot measure passed, the City implemented it by ordinance. (S.E.R. 60-67). Petitioners' assertion that "[t]he City * * * adopted a City Charter Amendment to prevent annexations without an approval vote of the City's citizens" (Pet. 4) leaves out the fact that the City was required to adopt the charter amendment by the passage of the ballot

measure.[2] Further, there is no evidence to support petitioners' statement that prior to the passage of the charter amendment, the City wrongfully induced petitioners to delay the filing of their annexation application until after the passage of the charter amendment. (*Id.*).

Petitioner Jones is the sole owner of and spokesperson for VJ-2 Development, Inc. ("VJ-2"), which purchased property located outside the city limits but inside the UGB in 1994. (App. 49, 50, 156). The City is aware of no evidence (other than the stricken Jones affidavit) supporting petitioners' statement that "[b]y the time Petitioners acquired their property, the City had extended water and sewer lines out to the property specifically designed to accommodate future urban development of this UGB property." (Pet. 4). In any event, if services had already been extended to the property, there would have been no reason for petitioners' June 11, 2003 request to have services extended to their property.

Prior to the passage of the Charter amendment, VJ-2 submitted an annexation proposal which was approved by the City's Planning Commission. (S.E.R. 1). Petitioners then withdrew part of their application, and because the City Council did not wish to consider petitioners' plans piecemeal, it legislatively denied the annexation, stating that it would consider the annexation once petitioners' total master plan was submitted. (*Id.*). Jones acknowledges that petitioners have no reason to believe that the Council made the request for improper reasons, to delay the processing of the application until the Charter amendment had passed, or to

---

[2] Petitioners' recital of criticisms of voter-approval for annexations (Pet. 4-5) does not change the fact that voter-approval is called for by a City ordinance and is not prohibited by statute.

intentionally harm them. (S.E.R. 15). The ballot measure requiring the Charter amendment was approved before petitioners submitted their master plan. (S.E.R. 60-67).

Between 1996, and 2000, VJ-2 submitted four separate proposals for annexation of the property. (App. 51, 52, 182). The City approved all of these annexation requests. (App. 51-52).[3] The annexation requests were submitted to the citizens for a vote, and all four were denied by the voters. (S.E.R. 17). Jones has no evidence that the City attempted to influence the vote on any of the proposed annexations. (S.E.R. 14). Jones knows of no situation in which the City approved an annexation after rejection by the voters or treated any developer differently than him after the voters had rejected a proposed annexation. (S.E.R. 18).

After portions of petitioners' property were acquired by the McMinnville School District and developer Alan Ruden, these parties were successful in obtaining voter approval of annexation of their property. (S.E.R. 30, 77-93; App. 133-134).

In 2003, petitioners submitted a request to the City Council to extend public facilities and services outside the City's boundaries to a portion of their property, and to modify the UGB Agreement to allow such an extension and to allow development of the property at urban densities despite its not being incorporated into the City. (S.E.R. 16; App. 182-184). The City Council unanimously denied the request. (S.E.R. 4, 16). The City's comprehensive plan expressly prohibits the

---

[3] Petitioners assert that they submitted ten separate annexation requests. (Pet. i, 5). Petitioners apparently refer to resubmissions. Petitioners' complaint lists four annexation requests. App. 51-52).

extension of urban services to unincorporated areas for the purpose of urban development. (S.E.R. 52-53). The City has never extended urban services outside of its boundaries and into the UGB area for the purposes of connecting unincorporated properties (S.E.R. 31) or allowed approval of urban development on unannexed land inside the UGB. (S.E.R. 23, 33). Where the City has placed sewer lines and other infrastructure in areas outside city limits but within the UGB, it has done so only to serve parcels located within city limits. (S.E.R. 33). Jones acknowledges that the decision by the City to deny his requests was not wrong, but he asserts that it was inconsistent with what he wanted to have happen. (S.E.R. 17).

II. REASONS FOR DENYING CERTIORARI

Review on a writ of certiorari is not a matter of right, and will be granted only for compelling reasons. Sup. Ct. R. 10. A review of the petition for certiorari reveals that petitioners are simply unhappy with the results in this case, and believe that it was decided incorrectly. Certiorari jurisdiction is "designed to serve purposes broader than the correction of error in particular cases." *Watt v. Alaska*, 451 U.S. 259, 276, n. 5, 101 S. Ct. 1673, 68 L. Ed.2d 80 (1981)(Stevens, J., concurring). Petitioners present no compelling reason for the grant of certiorari in this case.

A. The Ninth Circuit's Inverse Condemnation Ruling Presents No Basis For Review By This Court.

Petitioners assert that their inverse condemnation claim involves an important constitutional question. (Pet. 10). The only constitutional question presented, however, is a challenge pursuant to Article 1, section 18 of the Oregon

Constitution. Petitioners' federal inverse condemnation claim was dismissed as unripe by the district court. (App. 36-37). Thus, this claim presents no federal question, and is inappropriate for review by the Supreme Court.[4]

Petitioners argue that the Ninth Circuit's ruling on this issue conflicts with decisions of the Oregon Supreme Court, thus justifying "an exercise of tl s Court's supervisory power." (Pet. 11). This "supervisory power," however, is to be exercised where a "lower court has departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure." Sup. Ct. R. 10. Petitioners have suggested no such departure. They have, at most, suggested a misreading of Oregon law, which is not a basis for review by this Court.

B. Even If Review Of The Inverse Condemnation Ruling Were Appropriate, The Ninth Circuit's Application Of Oregon Law Was Correct.

Petitioners argue that the Ninth Circuit applied the wrong rule in holding that "a compensatory 'takings" claim under the Oregon Constitution is allowed only if the state regulation 'is a step in a plan to acquire the property for public use.'" (Pet. 11). This is, in fact, a correct statement of Oregon law. *Dunn v. City of Redmond*, 303 Or. 201, 205, 735 P.2d 609 (1987); *Schoonover v. Klamath County*, 105 Or. App. 611, 614-615, 806 P.2d 156, *rev. den.*, 311 Or. 432 (1991). There is absolutely no evidence on the record that the

---

[4] Petitioners' citation of federal cases (Pet. 12-13) demonstrates their fundamental lack of understanding that the question presented is strictly one of state constitutional law.

requirement that voters approve annexation was a step in a plan to acquire petitioners' property.

Further, even if petitioners were correct that the test is whether they were denied any economic use of the property (Pet. 12), there is no evidence supporting such a conclusion in this case. Finally, even if the district court and Ninth Circuit Court of Appeals had misconstrued the evidence, this would not be grounds for this Court to grant certiorari.

C. The Ninth Circuit's Equal Protection Ruling Presents No Basis For Review By This Court.

Petitioners attempt to interest the Court in this issue by asserting that the Ninth Circuit's decision "conflicts" with decisions of this Court and other state and federal courts. (Pet. 13). A review of petitioners' arguments, however, reveals that they have presented no conflict between courts on "an important federal question." Sup. Ct. R. 10. Instead, they seek error correction and factual reconsideration, neither of which is a proper function of this Court. Further, petitioners misrepresent the district court's reasoning and present an unpreserved question for review.

1. Petitioners Failed To Preserve Their Statute of Limitations Argument.

The district court held that petitioners's federal and state equal protection claims were both subject to a two-year statute of limitations. (App. 26, 29). Accordingly, the district court held that plaintiffs' equal protection claims were time-barred to the extent that they were based upon the denial of their annexation requests, and that only conduct arising from the City's denial of petitioners' request to extend public services facilities outside the City's boundaries would be considered.

(App. 26, 29). Petitioners did not challenge this ruling in their opening Ninth Circuit brief, but attempted to present a challenge in their reply brief, which the City moved to strike.

The Ninth Circuit did not rule on petitioners' motion to strike, but simply upheld the district court's ruling on the statute of limitations question. (App. 9-10). The City did not have an opportunity to address this issue before the Ninth Circuit, and the Supreme Court should, therefore, not consider petitioners' statute of limitations argument.

2. Even If Preserved, Petitioners' Statute Of Limitations Argument Lacks Merit.

The district court and Ninth Circuit correctly held that a two-year statute of limitations applied to petitioners' federal and state equal protection claims. *Sanok v. Grimes*, 306 Or. 259, 263, 760 P.2d 228 (1988)(Oregon's 2-year statute of limitations applies to section 1983 claims); *Medo-Bel Creamery v. State of Oregon*, 65 Or App. 614, 622, 673 P.2d 537 (1983)(2-year statute of limitations applied to state and federal equal protection claims); ORS 30.275(9)(creating two-year statute of limitations for any action arising from any act or omission of a public body or officer, employee or agent of public body).

Petitioners's reliance upon *Suess Builders Co. v. City of Beaverton*, 294 Or. 254, 656 P.2d 306 (1982) is unavailing. (Pet. 15). *Suess Builders* holds that a six-year statute of limitations applies to an inverse condemnation action. It says nothing about equal protection claims.

Further, even if petitioners were correct in their assertion that a six-year statute of limitations should have been applied, it would not be the function of this court to step in and correct

this error. In any event, application of a six-year statute of limitations would not further petitioners's cause. Application of a six-year limitation would do no more than allow consideration of the petitioners' claims based upon the denial of their annexation requests. The City approved all of these requests. It was the voters who disallowed them. Jones has acknowledged that he had no evidence that the City attempted to influence the vote on any of the proposed annexations and that he knows of no situation in which the City approved an annexation after rejection by the voters or treated any developer differently than him after the voters had rejected a proposed annexation. (S.E.R. 18). Thus, petitioners do not have an equal protection claim against the City based upon the denial of the annexation requests.

3. Petitioners' "Class Of One Argument" Includes An Incorrect Recital Of The District Courts' Ruling And Presents Nothing For This Court To Review.

Petitioners incorrectly state that the district court denied their equal protection claim on the ground that they were not part of a "suspect classification." (Pet. 14). Instead, the district court correctly ruled that "because plaintiffs do not belong to a suspect class, the court must apply a rational basis analysis to plaintiff's [equal protection] claim." (App. 28).

Petitioners' "class of one" argument presents no error, let alone a basis for review. Petitioners appear to believe that merely calling themselves a class of one will support an equal protection claim. (Pet. 14). An equal protection claim, however, may be successfully brought by a class of one only when the plaintiff can demonstrate a difference in treatment without a rational basis (federal law) or legitimate reasons related to the individual's situation (Oregon law). *Village of*

Willowbrook v. Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000); *State v. Clark*, 291 Or. 231, 239, 630 P.2d 810, *cert. den.*, 454 U.S. 1084 (1981).

Both the district court and the Ninth Circuit held that there was a rational basis for the City's refusal to allow the extension of City services to petitioners' property. (App. 10, 28, 30). Petitioners' attempt to reargue the facts pertinent to these holdings before this court is inappropriate. (Pet. 17-18). In any event, most of petitioners' factual arguments relate to petitioners' annexation requests, and, as set forth above, the equal protection claim based upon these requests is time-barred and without merit.

D. The Ninth Circuit's Due Process Ruling Presents No Basis For Review By This Court.

Once again, petitioners attempt to interest the Court in this issue by asserting a conflict with decisions of this Court (Pet. 19), and, once again, petitioners fail to present any actual conflict. Instead, the most that petitioners present is an argument that the issue was wrongly decided. This, by itself, is not grounds for granting certiorari. In any event, the issue was not decided incorrectly. Further, petitioners again present unpreserved questions for review.

1. Petitioners Failed To Preserve Their Statute of Limitations Argument.

Petitioners failed to preserve their argument that the wrong statute of limitations was applied to their due process claim by failing to raise it in their opening brief before the Ninth Circuit. The Ninth Circuit affirmed the district court's ruling that a two-year statute of limitations applied to the due process claim without ruling on the City's motion to strike

this argument from petitioners' response brief. (App. 11). The Court should not consider this argument because the City did not have an opportunity to address it before the Ninth Circuit.

2. Even If Preserved, Petitioners' Statute Of Limitations Argument Lacks Merit.

The City relies upon the arguments in section C.2. above.

3. Petitioners Failed To Preserve Their Argument That They Are Entitled To Bring A Due Process Claim In Addition To Their Equal Protection And Takings Claims.

Petitioners' opening brief in the Ninth Circuit failed to challenge the district court's ruling that petitioners were precluded from asserting a substantive due process claim where they had asserted an equal protection claim based upon the same facts. (App. 31). Petitioners attempted to address this issue for the first time in their reply brief, and the City moved to strike the argument. The Ninth Circuit ruled against petitioners on this issue without addressing the City's motion to strike. (App. 11). This Court should not accept review of this issue which the City did not have an opportunity to address in the Ninth Circuit.

4. Even If Preserved, Petitioners' Argument On Their Entitlement To Bring A Due Process Claim Presents No "Conflict" With This Court's Jurisprudence And Is Based Upon A Misreading Of The Ninth Circuit's Opinion.

The Ninth Circuit held that "substantive due process claims are barred where the claimant could seek equivalent

relief under constitutional provisions that provide more specific guarantees," and affirmed the district court's dismissal of the due process claim because petitioners' "federal substantive due process claim merely restates their takings and equal protections claims." (App. 11-12). Petitioners misstate the Ninth Circuit's ruling, quoting the Ninth Circuit's recital of the holding of *Buckles v. King County*, 191 F.3d 1127, 1137 (9th Cir 1999), which was addressed specifically to takings claims, rather than quoting the Ninth Circuit's actual holding set forth above. (Pet. 21; App. 11).

Petitioners assert that the Ninth Circuit's rule on this issue is "in direct conflict with the decisions of this Court and other circuit courts that allow litigation for separate constitutional violations including substantive due process, equal protection violations and "taking" of property without just compensation, particularly where the related remedies are different." (Pet. 19). The cases cited by petitioners, however, are not in conflict with the Ninth Circuit's ruling in this case. Neither *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985) nor *Rolf v. City of San Antonio*, 77 F.3d 823 (5th Cir. 1996) (Pet. 20) addresses or rules on the question of whether a party may bring both a general substantive due process claim and a more specific constitutional claim. In *Rolf*, the Fifth Circuit entertained both equal protection and First Amendment retaliation claims. The court noted in a footnote that because the First Amendment is made applicable to the states through the Fourteenth Amendment's due process clause, the First Amendment retaliation claim "may be characterized as a 'substantive due process claim.'" 77 F.3d at 827, n. 18. The First Amendment, however, provides specific protections, and the plaintiff in *Rolf* was not seeking to add a general due

process claim to his more specific equal protection claim as is the case here.

Petitioners also assert that they have been "forced to return ownership to their sellers of a portion of the restricted property (thereby inverse condemnation not being a complete remedy)." (Pet. 19). First, there is no evidence that petitioners' were "forced" to return ownership to the sellers or that the City did anything to force such a return. Second, to the extent that petitioners are arguing that they are entitled to bring a due process claim because it will give them a remedy that is unavailable under their other constitutional claims, this is not the case. Petitioners sought economic damages for the their inverse condemnation, equal protection and due process claims. (App. 67). They sought identical damages for the equal protection and due process claims. (*Id.*).

5. Petitioners' Arguments On The Merits Of Their Due Process Claim Do Not Belong Before This Court.

Petitioners seek a ruling on the merits of their substantive due process claim. Such a ruling is not the function of this court. In any event, petitioners' arguments are without merit. First, petitioners' arguments are exclusively directed to their annexation proposals. Their due process claim based upon these proposals, however, is barred by the two-year statute of limitations. (App. 31). Second, their arguments are based upon their claim that there was a lack of standards for the annexation decisions. (Pet. 21-23). Again, the decision not to annex was made by the voters. Oregon does not require that voters follow "standards" in passing on an annexation that has been approved by a governmental body. Once the City has determined that the proposal meets land use

requirements, the voters make a separate "political" decision as to whether the land should be annexed, a decision that is not subject to land use requirements. *Bear Creek Valley Sanitary Auth. v. City of Medford*, 130 Or. App.24, 880 P.2d 486, 489, *rev. den.* 320 Or. 493 (1994); *Dan Gile and Associates v. McIver*, 113 Or. App.1, 4-5, 831 P.2d 1024 (1992).

E. The Ninth Circuit's Antitrust Ruling Presents No Basis For Review By This Court.

Petitioners' assertion that the decision below conflicts with decisions of this court is wrong. (Pet. 24). Petitioners have pointed to no "conflict" on an important federal question requiring resolution by this court. Sup. Ct. R. 10(c).

1. The Ninth Circuit Did Not Misconstrue The Necessary Elements For State Action Immunity.

The Ninth Circuit correctly stated that a municipality is immune from federal antitrust liability where its actions restricting competition are authorized by state policy. (App. 7). *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38-39, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)(to obtain exemption from antitrust liability, a municipality must demonstrate that its anticompetitive activities were authorized by state policy to replace competition with regulation or monopoly public). It is apparently petitioners' position that the Ninth Circuit's ruling on "state action immunity" is in conflict with this Court's decision in *Town of Hallie*. (Pet. 24). There is no conflict.

In *Town of Hallie*, the defendant city refused to supply sewage treatment services to neighboring towns, but supplied services to individual landowners in areas where landowners

voted to annex to the city and use the city's sewage collection and transportation services. The towns sued the city, alleging that the arrangement constituted, *inter alia*, an illegal tying arrangement. The Supreme Court held that because state statutes authorized the city to provide sewage services and empowered the city to refuse to serve unannexed areas, the state policy would foreseeably result in anticompetitive effects, thus, immunizing the city from antitrust liability. 471 U.S. at 41-43.

In the instant case, the Ninth Circuit held:

> "[T]he City was entitled to immunity from Appellants' federal antitrust claim: the State authorized the City to make annexation decisions and limit urban development and services to annexed land, and anti-competitive conduct is a foreseeable result of this broad grant of land use planning authority."

(App. 8). This holding follows, rather than conflicts with, the holding in *Town of Hallie*. Petitioners, nonetheless, assert that "this Court in *Town of Hallie* * * * did not limit the state statutory inquiry, as did the Ninth Circuit in this case, to only the initial enacting statute for governmental activity," and "did not require that the court must invariably conclude, regardless of the circumstances, that a broad mandate to act gives authority to prevent others from acting." (Pet. 24).

Regardless of whether a broad mandate to act gives authority to prevent others from acting, the Ninth Circuit did not, as asserted by petitioners, limit its inquiry to "the initial enacting statute for governmental activity." (Pet. 24). Instead, the Ninth Circuit held that the district court had "properly reviewed the relevant state statutes and correctly determined that they grant municipalities broad authority to

engage in comprehensive land use planning, zoning, and annexation." (App. 7). The district court cited several Oregon statutes in reaching its conclusion that the City was immune from antitrust activity. (App. 18-22). Thus, the Ninth Circuit affirmed a ruling based upon a comprehensive review of relevant Oregon statutes. Petitioners' attempt to create a conflict with the holding in *Town of Hallie* is unavailing.

2. Petitioners' "Sham" Argument Presents No Important Federal Question For Review By This Court.

Citing *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, Inc., 365 U.S. 127, 144, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), petitioners assert that there is an exception to governmental immunity from antitrust litigation for a "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationship of a competitor * * *." (Pet. 25). Even assuming that such an exception was applicable here, it would not be the function of this court to correct any "error" in the Ninth Circuit's failure to apply the exception.

In any event, the exception does not apply. It is apparently petitioners' position that the relationship between the City's mayor and Alan Ruden, a plumbing contractor falls within this exception. (Pet. 25-26). The exception, instead, applies where there is a publicity campaign, ostensibly directed toward influencing governmental action. 365 U.S. at 144. This case involves no such publicity campaign. In any event, there is no evidence on the record of a conspiracy between the mayor and Mr. Ruden. Further, it was the voters, not the City, that denied petitioners' annexation requests and allowed Mr. Ruden's request. Finally, even if

bad faith on the part of the mayor could be proven, the court could not consider such evidence because "subjective motivation plays no part *at any point* in determining whether state action immunity protects the conduct of municipalities." *Traweek v. City and County of San Francisco*, 920 F.2d 589, 592 (9th Cir.1990)(emphasis in original). Further, this Court has ruled that there is no conspiracy exception to state action immunity. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 374, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991).

F. The Ninth Circuit's Rulings On Petitioners' Remand and Abstention Motions Present No Basis For Review By This Court.

1. The Ninth Circuit's Decision On The Motion For Remand Presents No Question Of Interest Beyond This Case.

The question of whether this case should have been remanded to the trial court presents no important federal question and, indeed, no question of interest beyond this case. As such, it is unsuitable for Supreme Court review.

2. Even If The Remand Ruling Were Appropriate For Review, The Case That Petitioners Cite As Conflicting With The Ninth Circuit's Decision Was Not Raised Below And Does Not support Petitioners' Position. In Any Event, Petitioners Challenge A Non-Essential Portion Of The Ninth Circuit's Ruling.

The Ninth Circuit correctly set forth the two-part ripeness test for a federal regulatory takings claim: (1) a final decision by the government entity regarding the application of the

regulations to the property at issue, and (2) the claimant has sought compensation through the procedures provided by the State. (App. 2). *Williamson County Regional Planning Com'n, supra*, 473 U.S. at 194. The Ninth Circuit agreed with petitioners that their federal takings claim was not ripe under the second part of this test because petitioners had not sought just compensation for the alleged taking through available state procedures. (App. 3).

The Ninth Circuit also reiterated its past holding that although the first prong of the *Williamson* test is applicable to substantive due process and equal protection claims brought to challenge land use regulations, the second prong is limited to takings claims and their equivalents. (App. 4). The Ninth Circuit concluded that petitioners' due process claims (to the extent they were cognizable) and equal protection claim were not mere reformulations of their federal takings claim, and concluded that these were ripe. (App. 4). Petitioners contend that this holding is in direct conflict with *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981). This argument does not merit consideration by this court for several reasons. First, petitioners did not raise *Parratt*, below. Second, *Parratt* has no bearing on this case. In *Parratt*, this court held that a person alleging deprivation of property by a random and unauthorized act of a state employee did not state a due process claim unless or until the State failed to provide an adequate post-deprivation remedy.[5] *Parratt* says nothing about the ripeness of a due process claim

---

[5] *Parratt* was later overruled to the extent that it recognized a due process claim based upon negligence. *Daniels v. Williams*, 474 U.S. 327, 328, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).

in the land use setting, and nothing at all about equal protection claims.[6]

Finally, even if petitioners were correct in their assertion that the Ninth Circuit's ruling regarding the second prong of the *Williamson* test conflicts with *Parratt*, this ruling was not essential to the Ninth Circuit's decision. The Ninth Circuit's decision was based upon the ripeness of petitioners' due process, equal protection and antitrust claims. (App. 4). Petitioners raise no issue about the ripeness of their antitrust claim. Thus, the Ninth Circuit correctly affirmed the district court's decision not to remand the case.

3. Petitioners' Additional Arguments Raise Nothing For This Court's Consideration.

Petitioners argue that once the district court and Ninth Circuit ruled on their state taking claim, their federal taking claim became ripe. (Pet. 28). First, petitioners did not raise this argument below. Second, the City fails to understand how this argument is of assistance to petitioners. If their takings claim was ripe, there was no basis for a remand.

Petitioners further argue that the first prong of the *Williamson* test was not met because the City failed to make any decision on one of its annexation requests. (Pet. 28).

---

[6] *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997) and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999), cited by petitioners (Pet. 27) also fail to address the applicability of the two-part *Williamson* test to equal protection or due process claims.

Not only is this assertion unsupported by the record, but it is irrelevant. The *Williamson* test did not apply to petitioners' antitrust claim, which by itself provided a basis for federal jurisdiction. Petitioners' argument that the second prong of the *Williamson* test requires that state remedies be pursued in state court (Pet. 28-29) is irrelevant for the same reason.[7]

4. An Abstention Ruling Is Not A Proper Subject For Supreme Court Review.

Petitioners ask this court to review the Ninth Circuit's decision not to abstain from accepting jurisdiction in this case. (Pet. 29). Once again, petitioners are asking for review of a matter with no significance beyond this case, and review should be denied.

5. Even If The Abstention Ruling Were Appropriate For Review, There Was No Basis For Abstention In This Case.

Petitioners asked the Ninth Circuit to "abstain from accepting jurisdiction until the conclusion of state claims in the state proceeding." (Resp. Br. 8). There was, however, no state claim to be concluded because all of plaintiffs claims, including their state claims, had been ruled upon by the district court.

Further, this case raises no issue of first impression for the Oregon Courts. (Pet. 29). The Ninth Circuit correctly

---

[7] In any event, petitioners' quotation from *Williamson* does not require that the state remedy be pursued in state court. It only requires that the state remedy be pursued prior to the federal takings claim.

ruled that "there is no unresolved issue of state law regarding the alleged conflict between the City's Charter Amendment, which allows the City's voters to veto proposed annexations, and Oregon's land use statutes, which require the City to comply with certain land use goals in making land use decisions." (App. 5). As noted by the Ninth Circuit, the Oregon Court of Appeals has held:

> "The decision by a city * * * that *proposes* an annexation is an act of planning that must comply with the land use laws; however, the subsequent acts that are necessary to finally adopt or reject the proposal, generally a popular vote under the ORS chapter 222 procedures, are not controlled by or subject to the land use laws."

Bear Creek Valley Sanitary Auth., supra, 130 Or. App. at 28-29 (emphasis in original). This ruling directly addresses the very question that petitioners assert has never been addressed by an Oregon court. (Pet. 29-30).

Neither *Dan Gile and Associates, supra*, nor *Cape v. City of Beaverton*, 187 Or. App. 463, 68 P.3d 261 (2003) (Pet. 30) supports petitioners' position or suggests that this case poses a question of first impression under Oregon law. In *Dan Gile,* the Oregon Court of Appeals ruled that a referendum could not be held on a zoning change, because this was a legislative land use decision. 113 Or. Ap. at 5-6. The court distinguished annexation cases because those entail two decisions– a land use decision by the governing body and a political decision by the electorate. 113 Or. App. at 5. *Cape* held that a governing body's annexation decision was a land use decision. There was no citizen vote involved. Thus, the *Bear Creek* ruling controls and answers the question

posed. There was no basis for abstention by the Ninth Circuit.

III. CONCLUSION.

For all of the above reasons, petitioners' petition for certiorari raises no issues suitable for consideration by this Court and should be denied.

Dated this 24th day of August 2007.

Respectfully submitted,

Janet M. Schroer, OSB No. 81365
Hoffman, Hart & Wagner
1000 S.W. Broadway, Suite 2000
Portland, Oregon 97205
Telephone: (503) 222-4499
Of Attorneys for Respondent
City of McMinnville